No. 95-1694-CFX Title: Regents of the University of California, et al., Petitioners
v.
John Doe, etc.

Docketed:
April 22, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 17 1996	Petition for writ of certiorari filed. (Response due May 22, 1996)
	Apr 17 1996	Appendix of petitioner filed.
	May 17 1996	Brief of respondents John Doe, et al. in opposition filed.
	May 20 1996	Motion of American Council on Education, et al. for leave to file a brief as amici curiae filed.
	May 29 1996	Reply brief of petitioners filed.
	May 29 1996	DISTRIBUTED. June 14, 1996
	Jun 17 1996	Motion of American Council on Education, et al. for leave to file a brief as amici curiae GRANTED.
	Jun 17 1996	Petition GRANTED. SET FOR ARGUMENT December 2, 1996. **********
	Jun 27 1996	Motion of respondent for leave to proceed further herein in forma pauperis filed.
	Jul 24 1996	Order extending time to file brief of petitioner on the merits until August 15, 1996.
	Aug 1 1996	Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
	Aug 12 1996	Motion of respondent for appointment of counsel filed.
	Aug 15 1996	Joint appendix filed.
	Aug 15 1996	Brief of petitioners Regents of the University of California, et al. filed.
	Aug 15 1996	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Aug 15 1996	Brief amicus curiae of United States filed.
	Aug 28 1996	DISTRIBUTED. September 30, 1996 (Page 116)
	Aug 29 1996	Order extending time to file brief of respondent on the merits until October 7, 1996.
	Aug 30 1996	Record filed.
	Sep 3 1996	Record filed.
	Sep 26 1996	Brief amicus curiae of James K. T. Hunter filed.
	Oct 7 1996	Motion for appointment of counsel GRANTED and it is ordered that Richard Gayer, Esquire, of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
	Oct 8 1996	Brief of respondents John Doe, et al. filed.
	Oct 10 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 16 1996	Opposition of respondents to motion of Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 21 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for

No. 95-1694-CFX

Entry	Date	Proceedings and Orders
		divided argument GRANTED.
	Oct 29 1996	CIRCULATED.
	Nov 8 1996	Reply brief of petitioners Regents of the University of California, et al. filed.
	Dec 2 1996	ARGUED.

No. 95 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 17, 1996

QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioners in this case are The Regents of the University of California and John Nuckolls, a University official sued in his capacity as Director of the Lawrence Livermore National Laboratory. Petitioners were defendants in the District Court and appellees in the Court of Appeals.

Dr. John Doe, Ph.D., on behalf of himself and all others similarly situated, was the plaintiff in the District Court and the appellee in the Court of Appeals. (The plaintiff's motion for class certification remains pending in District Court. *See* App. at 18a.)

In the Court of Appeals, the "Lawrence Livermore National Laboratory" was named by respondent Doe as an appellee, but he correctly recognized in his briefs to the Court of Appeals that the Laboratory is not a legal entity but only a physical facility owned by the United States Department of Energy and managed by the University. No entity denominated the "Lawrence Livermore National Laboratory" was represented on briefs in the Court of Appeals, and the Laboratory was not otherwise a "party" to the proceeding below separate and distinct from petitioners the University and Nuckolls.

A number of federal officials were originally named as defendants in the District Court, but they were dismissed pursuant to stipulation and were not parties in the Court of Appeals. There were no other parties in the Court of Appeals.

The Regents of the University of California is a corporation authorized by Article IX, Section 9(a) of the California constitution. It has no parent and no subsidiary companies.

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IN THE SUPREME COURT OF THE UNITED STATES
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No. 95 -

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, The Regents of the University of California (the "University") and John Nuckolls, a University official, hereby petition this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") at 1a - 14a) is reported at 65 F.3d 771. The memorandum opinions and orders of the United States District Court for the Northern District of California (App. at 15a - 33a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1995. A petition for rehearing was denied on January 19, 1996. App. at 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a contract action brought by Respondent Doe against the Petitioner University. The suit arises out of the University's activities in managing Lawrence Livermore National Laboratory, a federally-owned facility that the University operates pursuant to a contract with the United States Department of Energy ("DOE"). Doe alleges that the University breached a contract with him when it withdrew an offer for employment at the Laboratory after Doe had accepted the offer. The District Court dismissed Doe's action against the University on the grounds that the University was an instrumentality of the State of California, and that therefore the suit was barred by the Eleventh Amendment. The Ninth Circuit reversed. It held that the University was not entitled to be considered a State instrumentality

"in this specific instance" because the agreement between the federal government and the University concerning the operation of the Laboratory obligates the federal government to indemnify the University for any liability arising out of the University's management of the Laboratory. App. at 2a, 10a.

B. Factual Background.

Under Article IX, Section 9(a) of the California constitution, The Regents of the University of California is a corporation composed of 18 members appointed by the Governor with the consent of the State Senate, and seven ex officio members including, *inter alia*, the Governor, the Lieutenant Governor, and the Speaker of the State Assembly. The University is viewed under State law as "a constitutionally created arm of the state," *Regents of the University of California* v. *City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978), "a branch of the state itself," *Penington* v. *Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936), "a statewide administrative agency," *Ishimatsu* v. *Regents of the University of California*, 72 Cal. Rptr. 756, 763 (Cal. Ct. App. 1968), and "'a branch of government equal and coordinate with the Legislature, the judiciary, and the executive.'" App. at 7a (quoting 30 Op. Cal. Att'y Gen. 162, 166 (1957)). *See also Hamilton* v. *Regents of the University of California*, 293 U.S. 245, 257 (1934) (holding that the University "is a constitutional department or function of the state government").

The administration of the University is designated a "public trust" under the Article IX, § 9(a) of the State constitution. Public support of the University "[f]rom all state revenues" is constitutionally required to be a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). The University is authorized to exercise the power of eminent domain, Cal. Educ. Code § 92439 (West 1989), and is exempt from both local taxation, *id.* § 92443, and local regulation, *Regents of the University of California* v. *City of Santa Monica*, 143 Cal. Rptr. at 279-80. Under California law, "[a]ll of [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); *see also In re*

Bacon, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966) (same); *Vaughn* v. *Regents of the University of California*, 504 F. Supp. 1349, 1354 (E.D. Cal. 1981).

The Lawrence Livermore National Laboratory is a federal facility owned by the United States Department of Energy.[1/] The facility is managed and operated by the University pursuant to a contract with the DOE. Under the contract, the University handles all employment matters at the Laboratory, but the DOE retains control over the issuance of security clearances for Laboratory employees. App. at 3a.

The contract provides that, subject to a number of qualifications, the DOE shall indemnify and hold the University harmless for any loss, judgment or liability "arising out of or connected with the work [under the contract]." App. at 36a (University-DOE Contract, Art. XVII, cl. 4(b)). The contractual qualifications to DOE's obligation cover circumstances where the loss (1) is caused by "bad faith or willful misconduct," (2) "would ultimately be an unallowable cost under the provisions of [the] contract," or (3) "results from a contractual commitment which when incurred exceed[s] the funds then obligated to the contract." *Id.* Furthermore, DOE's obligation to indemnify is expressly limited by "the availability of funds appropriated from time to time by Congress." *Id.* at 37a (Contract, Art. XVII, cl. 4(d)).

Respondent Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. He alleges that, in mid-June of 1991, he accepted an offer from the University for employment at the Lawrence Livermore National Laboratory. Doe further alleges that shortly thereafter, the University attempted to withdraw the offer of employment on the grounds

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[1/] Respondent originally named the Lawrence Livermore National Laboratory as a defendant entity in this suit but, on appeal, he correctly recognized that the Laboratory is not a legal entity but only a physical facility owned by the DOE. Appellant Br. at 5 n.2.

that he would be unable to obtain the proper security clearance from the DOE.

C. Proceedings Below.

Doe filed this action on June 19, 1992, in the United States District Court for the Northern District of California. On February 5, 1993, the District Court issued a preliminary ruling dismissing certain of the claims against some of the defendants named in Doe's original and first amended complaints.[2/]

On April 7, 1993, Doe filed a second amended complaint containing two claims. The first claim was against the University for breach of an employment contract, and federal jurisdiction was premised on diversity of citizenship, 28 U.S.C. § 1332. The second claim was a claim under 42 U.S.C. § 1983 against the University and Petitioner Nuckolls for allegedly depriving Doe of his rights under federal security clearance regulations, which Doe claims were violated when allegedly "unqualified" personnel at the Laboratory "determined" his eligibility for a security clearance without regard to the procedures set forth in the regulations. *See* App. at 4a. Jurisdiction over that claim was based on an asserted federal question, 28 U.S.C. § 1331. The two claims in Doe's second amended complaint define the current scope of the litigation.[3/] For relief, Doe requested (*inter alia*) money damages under the alleged employment contract in an amount exceeding $100,000 (the claimed amount of back pay is much higher at this time) and an order of specific performance requiring the

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[2/] Doe also originally named as defendants the DOE, James Watkins (then the Secretary of Energy), and Richard Claytor (then the Assistant Secretary of Energy for Defense Programs). In November of 1992, however, Doe agreed to a stipulation by which all the federal defendants were dismissed from the case with prejudice.

[3/] Doe's second amended complaint also requested that the District Court certify a class on behalf of all others similarly situated. The District Court did not act on the class certification request. *See* App. at 18a.

University to hire Doe as a physicist according to the terms of the alleged employment contract.

On May 10, 1993, the University moved to dismiss all claims in Doe's second amended complaint, and the District Court granted the motion in all relevant respects on June 24, 1993. The Court held that the University was an "arm of the State" for purposes of the Eleventh Amendment, and that Doe was therefore barred from pursuing the breach of contract claim in federal court. App. at 24a.

The Court also dismissed the Section 1983 claim against the University and against Petitioner Nuckolls in his official capacity as Director of the Laboratory. *Id.* at 22a - 24a. The Court noted that, under *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989), governmental entities considered "arms of the state" for Eleventh Amendment purposes, and officials of such entities (when sued in their official capacity), are not considered "persons" within the meaning of the Section 1983, and are thus not subject to Section 1983 liability. App. at 22a - 23a. Accordingly, the Section 1983 claims against the University and Petitioner Nuckolls in his official capacity were dismissed. *Id.* at 25a. The District Court entered a final, appealable judgment on September 13, 1993, *id.* at 15a, from which Doe filed a timely appeal to the Ninth Circuit.

A divided panel of the Ninth Circuit reversed. The majority employed a five-factor test to determine "whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court." *Id.* at 6a. The Court considered:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 6a-7a (quoting *ITSI TV Prods.* v. *Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)) (citations omitted).

The Ninth Circuit had previously ruled that the University was entitled to Eleventh Amendment immunity, *see Thompson* v. *City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *BV Engineering* v. *Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), and application of the last four of the five factors, which depend on the general structure and function of the University, were unchanged since these prior rulings. The Court, however, distinguished its prior authority on the basis of the first factor. The majority ruled that application of the first factor depended on the "source of funding in each situation," App. at 9a, and thus the University could be an arm of the State in some of its capacities, but not in others, *see id.* The majority determined that the first factor weighed against recognizing Eleventh Amendment immunity because the University-DOE "Contract makes clear that the [DOE], and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." *Id.* at 7a.

On that basis, the Court held that the University, in its capacity as manager of the Laboratory, was not an arm of the State for purposes of the Eleventh Amendment. App. at 10a. Because the University was not considered part of the State, it was subject to the Court's diversity jurisdiction on Doe's contract claim. Also, for the same reason, neither it nor its officials were protected by the rule in *Will* v. *Michigan Department of State Police*, 491 U.S. 58 (1989), and, accordingly, were subject to suit under Section 1983.

Judge Canby dissented. In his view, the prior case law establishing that the University was a State instrumentality (*Thompson*, *supra*; *BV Engineering*, *supra*) should have been

controlling, and the Court should not "reassess the status of the University in the absence of a change in its structure." App. at 11a-12a.

Judge Canby recognized that the majority's decision turned on the first factor of its five-part test, *see id.* at 11a, but in his view that "factor must be viewed as a legal, not an economic matter." *Id.* at 13a. To Judge Canby, the crucial issue was whether the State treasury is legally obligated and, he noted, "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California." *Id.* Accordingly, Judge Canby argued that the University's contractual right to seek indemnity from the United States should be irrelevant to the analysis:

> A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. On that basis, Judge Canby concluded that the University should be considered part of the State for purposes of the Eleventh Amendment, and that the University's officials would therefore also be immune from Section 1983 official capacity suits under the rule in *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989).

The University and Petitioner Nuckolls filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied by the Ninth Circuit on January 19, 1996. This petition for certiorari was then filed.

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split On Whether Eleventh Amendment Immunity Turns On The Legal Liability Of A State Entity Or On A Prediction Of The Likely Financial Impact Of A Particular Judgment.

The Circuits are split on an important constitutional question concerning the Eleventh Amendment. The two sides of this split are represented by the majority and dissenting opinions below: Some circuits follow the rule urged by the dissent — that the immunity of State entities under the Eleventh Amendment should be based solely on the legal liability of the State entity for the judgment. Other circuits follow the approach adopted by the majority — that the immunity of State entities must be based on a prediction of the likely financial impact of a particular judgment on State resources. Under this second view, State entities may lose their Eleventh Amendment immunity to the extent that they have rights to reimbursement from third parties.

This circuit split arises most frequently in the context where, as in this case, the State defendant has a right to reimbursement from the federal government. It was in this context that the split was recognized by Justice White in 1992 as "important." *See Paschal* v. *Didrickson*, 502 U.S. 1081, 1082 (1992) (White, J., dissenting). Furthermore, the uncertainty engendered by this circuit split is now to the point that even on the most narrow view of issue presented by this case — *i.e.*, whether this particular University may invoke the protection of the Eleventh Amendment for its functions in operating national research laboratories pursuant to federal contract — there is a divergence of circuit authority. *See Mascheroni* v. *Board of Regents of Univ. of Calif.*, 28 F.3d 1554 (10th Cir. 1994) (sustaining University of California's Eleventh Amendment immunity in employment action arising out of University's management of Los Alamos National

Laboratory, another national laboratory operated by the University pursuant to a DOE contract).[8]

The Seventh Circuit has consistently taken the position urged by the dissent below. In *Cannon* v. *University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983), the court held that Southern Illinois University (SIU) and the Board of Trustees of the University of Illinois (UI) were entitled to Eleventh Amendment immunity against Cannon's discrimination claims under 42 U.S.C. § 1983. The court first determined that SIU and UI are "recognized as state agencies under Illinois law" and thus are entitled to immunity as a threshold matter. *Id.* at 356. The court rejected the argument that its analysis should be "altered by the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* at 357.[9] Rather, the court adopted the position that "[i]f Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment." *Id.*

The Seventh Circuit's position in *Cannon* is essentially identical to the position urged by Judge Canby below. Both

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[8] The court in *Mascheroni* did not expressly consider the indemnification aspect of the University's agreement with the DOE but, as Justice White noted in his dissent from the denial of certiorari in *Paschal*, *see* 502 U.S. at 1081, the Tenth Circuit has aligned itself on the side of the circuit split that disregards the source of the state funds in applying the Eleventh Amendment. *See Esparza* v. *Valdez*, 862 F.2d 788, 794 (10th Cir. 1988); *see also infra*, at pp. 13-14.

[9] State entities, like SIU and UI, may carry third party insurance because, among other reasons, the State has waived its sovereign immunity in its own courts. Such waivers do not, however, constitute waivers of the State's immunity to suit in *federal* court under the Eleventh Amendment. *See Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) ("Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment.").

Cannon and this case involved suits against State universities, and in both cases, the plaintiffs alleged that the universities may be able to offset the effects of the judgment with insurance or federal funds. The Seventh Circuit, however, rejected that argument and focused solely on the universities' *legal* liability as the touchstone for Eleventh Amendment immunity. This mirrors the dissent's position below:

> "The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. . . . The question is not who pays in the end: it is who is legally obligated to pay the judgment that is being sought. Here it is the State." App. at 13a (Canby, J., dissenting).

The Seventh Circuit reaffirmed this position in *Kroll* v. *Board of Trustees of University of Illinois*, 934 F.2d 904 (7th Cir. 1991), where it again held that UI was entitled to Eleventh Amendment immunity against § 1983 claims. Kroll contended that potential proceeds from various insurance policies would "comprise a source of income other than the state treasury" and thus abrogate immunity. *Id.* at 908. The court rejected the contention "that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury." *Id.* The court held that a suit against a State agency such as UI must be dismissed unless the suit falls within one of two exceptions -- waiver by the State to suit in federal court, or abrogation of the Eleventh Amendment by Congress.[9] *Id.*

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[9] *Kroll* left open the possibility that, if UI's sources of income from all outside sources rendered UI independent from the public fisc, the institution as a whole may no longer be viewed as part of the State for purposes of the Eleventh Amendment. That possibility is, however, quite different from the Ninth Circuit's ruling. The Ninth Circuit did not rule

(continued...)

Because neither of these exceptions existed, the court sustained the immunity claim of the University of Illinois without regard to the possibility of third-party indemnification.

The Seventh Circuit further solidified its position in *Paschal* v. *Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. denied*, 502 U.S. 1081 (1992).[2] There, the court held that the State was entitled to Eleventh Amendment immunity against the plaintiffs' claims for past unemployment benefits even where the federal government was required to reimburse the State for "the whole award." *Id.* at 943. The court stated that it would "prefer an approach that disregards the source of state funds" because otherwise the courts would have "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" *Id.* at 944. The court's conclusion was identical to that urged by the dissent below: "'Where Illinois gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state.'" *Id.* (quoting *Cosby* v. *Jackson*, 741 F. Supp. 740, 742 (N.D. Ill. 1990)). *Compare* App. at 14a (Canby, J., dissenting) (arguing that the University should be held immune "because the judgment sought against it would be a legal liability of the State").

The leading circuit on the other side of the split is the Fourth Circuit. In *Brown* v. *Porcher*, 660 F.2d 1001 (4th Cir.), *cert.*

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[2](...continued)
that the University has become so financially independent from the State of California that it should not longer be considered part of the State government for purposes of the Eleventh Amendment. Rather, the majority opinion adopts the position rejected by *Kroll* and *Cannon* that the University may not be entitled to immunity in particular cases where the University can seek reimbursement from a third party.

[2] As noted above, Justice White dissented from the denial of certiorari in *Paschal* on the grounds that there was a conflict among the circuits on an "important" issue. *See* 502 U.S. at 1082.

denied, 459 U.S. 1150 (1981), the court held that, notwithstanding the Eleventh Amendment, the South Carolina Employment Security Commission — which otherwise would qualify as part of the State for purpose of the Eleventh Amendment — could be sued in federal court for a retroactive award of unemployment benefits. The court there acknowledged that the award against the State Commission could amount to "several million dollars" but nonetheless ruled that the Eleventh Amendment did not apply because the Commission could "recoup, on an actuarial basis, sums that are attributable to the awards." 660 F.2d at 1006. Such recoupment, the court found, could come from employers covered by the unemployment insurance program and from federal contributions. *Id.*; *see also id.* at 1007 (money for unemployment award would come from "employer contributions, federal funding, investment income, and other receipts"). Accordingly, because the State's "general revenues" would be protected from liability, the court held that "a retroactive award against the South Carolina Employment Security Commission does not violate the eleventh amendment." *Id.* at 1007.

Although *Brown* v. *Porcher* was a case of first impression at the appellate level and thus gave rise to no circuit split, the Fourth Circuit's extraordinary ruling still attracted the attention of three Justices, who believed the Eleventh Amendment issue "significan[t]" and "important." 459 U.S. 1150, 1153 (White, J., joined by Powell and Rehnquist, JJ., dissenting from denial of certiorari).

Other circuits have taken different positions on the basic circuit split. As Justice White noted in dissenting from the denial of certiorari in *Paschal*, the Tenth Circuit shares the position of the Seventh. In *Esparza* v. *Valdez*, 862 F.2d 788 (10th Cir. 1988), which was cited with favor by *Paschal*, the court held that a state agency had immunity from suit under the Eleventh Amendment even though the judgment would operate only against a fund that would be replenished by federal funding, employer contributions, and other sources. *Id.* at 795. The court rejected the Fourth Circuit's position in *Brown* v. *Porcher* and held that

"even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis."[8/] *Id.* Thus, where a judgment would run against a State agency, the suit is barred regardless of the source of the funds to pay the judgment. *Id.*

The Third Circuit has adopted a modified version of the Fourth Circuit's *Brown* v. *Porcher* position that allows recovery against State defendants *to the extent* that the State would receive federal reimbursement. In *Bennett* v. *White*, 865 F.2d 1395 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), the court denied Eleventh Amendment immunity to a State agency where the plaintiffs sought State payments pursuant to an Aid to Families with Dependent Children (AFDC) program. Under AFDC, the federal government reimburses States for "at least 50 percent" of their expenditures under the program. *Id.* at 1398. The court reasoned that, to confer immunity on the State and relieve it from the need to seek reimbursement would confer "an unwanted bonanza upon the United States." *Id.* at 1408. Accordingly, the court ordered an accounting so that the district court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United

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[8/] In a recent Tenth Circuit case, *Lujan* v. *Regents of University of California*, 69 F.3d 1511, 1522-23 (10th Cir. 1995), the court noted in passing a few of the conflicting authorities (including the Seventh Circuit's ruling in *Kroll*) on the issue whether State entities lose Eleventh Amendment immunity where they may ultimately receive reimbursement from the federal government or other third party. The court, however, did not have to reach the issue in that case. Accordingly, it did not investigate the issue further and did not note its prior ruling in *Esparza* that rejected the Fourth Circuit's *Brown* v. *Porcher* ruling and held that the Eleventh Amendment protects States even from suits having "little or no fiscal impact" on the State.

States." *Id.*; *see also Robinson* v. *Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989) (same).[9/]

The Third Circuit's position in *Bennett* is inconsistent with the First Circuit's ruling in *Fernandez* v. *Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982), *aff'd on other grounds sub nom.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983). The First Circuit there acknowledged that some early district court cases supported the plaintiffs' argument "that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages." 681 F.2d at 59. The court, however, refused to create an exception to the Eleventh Amendment where the State and federal funds are "intermingled," *id.*, and noted that this Court held in *Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (*per curiam*) that "state participation in federally funded public aid program[s] does not amount to [a] waiver of sovereign immunity." 681 F.2d at 60.

Despite its ruling in *Fernandez*, the First Circuit did create an exception to the Eleventh Amendment in *Foggs* v. *Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds sub nom.*, *Atkins* v. *Parker*, 472 U.S. 115 (1985). As Justice White noted in his dissent from the denial of certiorari in *Paschal*, *see* 502 U.S. at 1082, the First Circuit in *Foggs* held that the Eleventh Amendment did not bar a suit against State defendants where the federal government (through its food stamp program) would reimburse the State for *all* (or almost all) of the costs of the judgment. 722 F.2d at 941 n.6. The First Circuit recognized that entering judgment against the State might impose "some administrative costs" on the State, but concluded that the Eleventh

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[9/] The dilemma of attempting to achieve the result sought by the Third Circuit in a matching fund program illustrates the difficulty of predicating Eleventh Amendment immunity on assumptions as to the impact of a judgment on the state fisc. *See* section B.2, *infra*.

Amendment should not apply because those costs "should be de minimis." *Id.*[10/]

More recently, however, the First Circuit has expressed doubt that the Eleventh Amendment permits damage awards against a State treasury where the State may seek reimbursement from the federal government. *See Doucette* v. *Ives*, 947 F.2d 21, 29 (1st Cir. 1991). The court stated that relying on federal reimbursement as a means around the Eleventh Amendment "seems a problematic argument given the delays and uncertainties likely in the [federal] reimbursement procedure and the fact that, in the meantime, the court's judgment would seemingly have to be satisfied from the state's fisc, thus violating the Eleventh Amendment." *Id.* Nevertheless, the *Doucette* court declined to reach the issue because it determined that the plaintiffs were procedurally defaulted on the argument. *Id.* at 29-30.[11/]

In the context of reimbursement by a private insurer (not the federal government), the First Circuit has held that the determination of Eleventh Amendment immunity should *not* be affected by the fact that the State entity may obtain reimbursement. Like the Seventh Circuit in *Cannon*, which refused to qualify UI's Eleventh Amendment immunity because

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[10/] The First Circuit's determination in *Foggs* that administrative costs are irrelevant to the Eleventh Amendment analysis is inconsistent with the position of the Sixth Circuit. In *Cotton* v. *Mansour*, 863 F.2d 1241, 1245-47 (6th Cir. 1988), the court held that the Eleventh Amendment prohibited retroactive relief against a State, even where the federal government would reimburse the State for the entire cost of the judgment, because the State would still shoulder some administrative costs. *See also Colbeth* v. *Wilson*, 554 F. Supp. 539, 544-46 (D. Vt. 1982) (same), *aff'd*, 707 F.2d 57 (2d Cir. 1983) (*per curiam*).

[11/] The court decided that, if such a reimbursement exception existed, it would necessitate "a fact-specific inquiry" to determine the precise impact of the judgment on the State. The plaintiffs were procedurally defaulted because they had not developed such a factual record in district court.

the judgment might be satisfied by insurance proceeds, 710 F.2d at 357, the First Circuit in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940 (1st Cir. 1989), held that the Tourism Company of Puerto Rico was entitled to Eleventh Amendment immunity even though "any judgment against the Tourism Company would be paid by its insurance carriers."[12/] The court determined first that the Tourism Company should be viewed as an instrumentality of Puerto Rico,[13/] and then held that "the fact that any damages might be paid by an insurance carrier does not alter the fact of Eleventh Amendment immunity." *Id.* at 945.[14/]

The distinction between federal and private reimbursement reveals the unstable nature of the case law generated by trying to predict the ultimate financial impact of a judgment, rather than by determining the legal liability for the judgment. The First Circuit in *San Juan Dupont Plaza* reasoned that allowing federal

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[12/] The Commonwealth of Puerto Rico is treated as a State for purposes of determining Eleventh Amendment immunity. *See Ramirez* v. *Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983).

[13/] To determine whether the Tourism Company should be viewed as an instrumentality of Puerto Rico, the court examined the structural and financial relationship between the Company and the government. Thus, for example, the court relied on the facts that the entire board of directors is appointed by the Governor of Puerto Rico, *see San Juan Dupont Plaza*, 888 F.2d at 944, that the Company "'performs a vital governmental function in promoting the tourism industry and supervising gambling in the casinos in Puerto Rico,'" *id.* (quoting district court findings), and that much of the money available to the Company was provided by the taxpayers of the Commonwealth, *see id.* at 943-44.

[14/] In reaching its decision, the First Circuit relied on the Ninth Circuit decision, cited in Judge Canby's dissent below, of *Markowitz* v. *United States*, 650 F.2d 205 (9th Cir. 1981), which also held that private insurance does not defeat a State's Eleventh Amendment immunity. *See* 650 F.2d at 206. Thus, both the First and Ninth Circuits distinguish between federal reimbursement and reimbursement by private insurers.

judgments to run against insured State entities would "contravene the purpose of the Eleventh Amendment" because "they would be forced to pay higher premiums for their insurance." *Id.* But the prediction of higher premiums is unfounded speculation given that the Court was considering only immunity from suit *in federal court*. As the court noted, the State entity was subject to suit in state court pursuant the "sue and be sued" provision in its statutory corporate charter.[15/] *Id.* at 944-45; *See also Florida Nursing Home Assn.*, 450 U.S. at 149-50 (sue-and-be-sued clause authorizes suits in State, but not federal, courts). The First Circuit had no reason to believe that insurers would charge higher premiums based on the forum in which the entity could sued, even though the same substantive law would be applied in both fora. The contrast between the First Circuit's decisions in *San Juan Dupont Plaza* and *Foggs* demonstrates further contradictions and inconsistencies generated in this area of law by courts that base Eleventh Amendment immunity on a prediction of the ultimate financial impact of a particular judgment.

Finally, the Fifth Circuit in *Cronen* v. *Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), rejected the argument that a State or State agency could be sued if the federal government would ultimately bear the entire cost of the judgment.[16/] Based on its reading of this Court's decisions, the court concluded that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.*

[15/] The same was true in *Markowitz*: Sovereign immunity has been waived in State courts, so the Eleventh Amendment issue would determine only the forum of the suit. *See* 650 F.2d at 206.

[16/] The Fifth Circuit incorrectly aligned the Seventh Circuit with the Third Circuit on the basis of *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir. 1973). Not only does *Jordan* fail to address the federal reimbursement point, but the court's Eleventh Amendment holding was reversed on appeal by this Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). The Fifth Circuit failed to note that more recent Seventh Circuit cases have squarely rejected a reimbursement exception to the Eleventh Amendment.

The different approaches by the circuits have now led to a split on the precise factual situation involved in this case. In *Mascheroni* v. *Board of Regents of Univ. of Calif.*, 28 F.3d 1554 (10th Cir. 1994), another plaintiff sued the University of California over an employment matter at another national laboratory (Los Alamos National Laboratory) that the University operates under a like contract with the DOE. The Tenth Circuit, however, dismissed that action on Eleventh Amendment grounds. Consistent with the Tenth Circuit view expressed in *Esparza*, the court in *Mascheroni* did not concern itself with what funds the University would use to satisfy the particular judgment against it.[17/] *See Esparza*, 862 F.2d at 795 ("even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis"). Because the University is a branch of State government, the court ruled that the plaintiff could not proceed unless he could prove either that the State waived its immunity, or that Congress abrogated the immunity for the State. *Id.* at 795-96. That two cases arising out of nearly identical circumstances can be treated so differently demonstrates the absence of uniform principles of law on this important issue.

Finally, in addition to the conflicting circuit authority on this issue, there are a number of conflicting district court cases. These

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[17/] The Eleventh Amendment was raised *sua sponte* by the court of appeals in *Mascheroni*. (The University won a motion to dismiss in the district court on different grounds (*i.e.*, statute of limitations).) The court's opinion does not specifically address the intricacies of the University-DOE contract but, given its ruling in *Esparza*, the court had no need to investigate the financial impact of the judgment. *Mascheroni* points up an important procedural point: If the Eleventh Amendment immunity is to remain a *jurisdictional* doctrine, the test for determining its application must remain capable of being decided in the preliminary stages of litigation and by a court *sua sponte* if necessary. A test that focuses on the financial impact of the judgment will, however, demand discovery and a fact-intensive inquiry in many cases. *See* section B.2, *infra*.

additional cases further demonstrate that this issue arises regularly and warrants the attention of this Court.[18/]

In sum, there is a significant split in authority whether State entities retain their Eleventh Amendment immunity notwithstanding reimbursement or indemnification arrangements. The Seventh, Fifth and Tenth Circuits take a position consistent with the dissent's position below; they afford Eleventh Amendment immunity to State entities where the State entity is legally liable for the judgment and disregard whether the State may be able to recoup its losses from some third party. In contrast, the Third and Fourth Circuits hold that the possibility of reimbursement vitiates Eleventh Amendment immunity, even though the State defendant remains legally liable. The First and now Ninth Circuits seem to take a slightly different position — that the possibility of reimbursement by the *federal government*, but not by a private insurer — vitiates the Eleventh Amendment immunity that a State defendant would otherwise possess.

[18/] *See, e.g.*, *McGuire* v. *Switzer*, 734 F. Supp. 99, 106-07 (S.D.N.Y. 1990) (refusing to create exception to Eleventh Amendment for possibility of future federal reimbursement, at least where federal government's liability has not previously been adjudicated under binding case law); *Temple University* v. *White*, 729 F. Supp. 1093, 1101 (E.D. Pa. 1990) (following Third Circuit decision in *Bennett* and ruling that plaintiff is entitled to retroactive relief against State defendants to the extent that they can "recapture . . . additional sums from the federal treasury retroactively"); *Dunlop* v. *Minnesota*, 626 F. Supp. 1127, 1130 (D. Minn. 1986) (refusing to recognize "federal reimbursement" as an exception to Eleventh Amendment immunity where State had a right under regulations to federal reimbursement for certain claims of plaintiffs); *County Dep't of Public Welfare* v. *Stanton*, 545 F. Supp. 239, 243 n.3 (N.D. Ind. 1982) (refusing to order State to release federal reimbursement funds because of Eleventh Amendment); *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), *aff'd without op.*, 639 F.2d 768 (2d Cir. 1980) (holding that the Eleventh Amendment did not bar a suit for food stamp benefits because the State could appropriately seek federal reimbursement for any liability).

The University strongly supports the position of the Seventh, Fifth and Tenth Circuits and the dissent below. Indemnity and reimbursement agreements should not affect whether a State or one of its component entities is amenable to federal court jurisdiction. Such agreements are arrangements between the State and a third party (frequently, as in this case, between the State and the federal government); they do not alter the fundamental fact that a federal court's judgment will be legally enforceable against only the State or the State component, not the third party. Moreover, the position adopted by the majority below represents a significant infringement on State sovereign immunity and a substantial practical burden. But regardless which position is correct, the result should not vary from circuit to circuit, as is currently the case.

B. The Issue Presented Here Is Important Because The Position Adopted By the Majority Below Significantly Infringes Upon State Sovereign Immunity and Imposes Heavy Practical Burdens.

1. The Inconsistency With This Court's Decisions.

As explained above, the issue presented by this petition warrants the attention of this Court because it arises frequently and has divided the circuits. But the issue also has important implications for maintaining the integrity of State Eleventh Amendment immunity, as defined by this Court's prior cases.

The rule adopted by the majority below, and by the First, Third and Fourth Circuits, distorts the purpose of State Eleventh Amendment immunity. Such immunity is *not* just about protecting States from the ultimate financial impact of suits; it is more generally concerned with protecting the States from having to appear and defend suits in the federal courts, regardless of the financial impact of the particular suit. As this Court recently stated, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' . . . ; it also serves to avoid the indignity of

subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida* v. *Florida*, 116 S.Ct. ___, ___ (slip op. at 12-13) (March 27, 1996) (citations omitted). Accordingly, this Court has "often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Id.*, 116 S.Ct. at ___ (slip op. at 12); *see also Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).[19]

As this Court has repeatedly held, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984) (footnote omitted). Thus, it is black letter law that a State's general waiver of sovereign immunity does not constitute a waiver of Eleventh Amendment immunity to suit in federal court. *See Florida Nursing Home Assn.*, 450 U.S. at 150; *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985). This approach to Eleventh Amendment immunity makes little sense if the immunity is concerned only with the financial impact of the suit. Once a State has consented to suit in its own courts, suit in federal court should not lead to any more financial impact on the State than suit in State courts, given that the same substantive law must be applied in both fora.

Nonetheless, States waiving sovereign immunity remain immune from suit in federal court, because the Eleventh Amendment encompasses not a substantive immunity but a *jurisdictional* rule that protects the State's dignitary interests in

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[19] Given this Court's holding in *Seminole Tribe of Florida* that the relief sought is irrelevant to Eleventh Amendment analysis, we believe that the Court could appropriately reverse the decision of the Ninth Circuit below on summary action. Our claim to summary reversal is supported by *Florida Nursing Home Assn.*, where this Court also took summary action to correct a court holding that was inconsistent with the approach taken in this Court's previous decisions.

being held accountable only in courts of its own creation. *See Seminole Tribe of Florida*, 116 S. Ct. at ___ (slip op. at 12-13) (noting the States' dignitary interests); *Pennhurst*, 465 U.S. at 100 (Eleventh Amendment doctrine is grounded in the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other"). Indeed, precisely because the Eleventh Amendment embodies a threshold jurisdictional rule, this Court held in *Puerto Rico Aqueduct* that a State or State entity may appeal a denial of immunity immediately under the collateral order doctrine. *See* 506 U.S. at 146-47.

The importance of States' dignitary interests in being immune from federal court jurisdiction is also confirmed by this Court's analysis in *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). There, the Court considered the States' dignitary interests and the accompanying federalism concerns *first* in its analysis. The Court initially satisfied itself that "[b]istate entities occupy a significantly different position in our federal system than do States themselves," 115 S. Ct. at 400, and that "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States," *id.* at 401. *See also id.* at 404 (recognizing first step in analysis was determining that it is not "disrespectful to one State to call upon the Compact Clause entity to answer complaints in federal court").[20] Only after it had decided that Compact Clause entities are separate and different from the States which form them did the Court consider "the vulnerability of the State's purse" (*id.*

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[20] As *Hess* and another prior case recognized, *see* 115 S. Ct. at 401-02; *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979), Compact Clause entities — formed by two or more States and unaccountable to people of any one State — cannot fit comfortably into the text of the Eleventh Amendment, which provides immunity in suits against "*one* of the United States." Obviously, that important textual consideration supports immunity in this case, as the University was created as a governmental department by the California constitution, and it is accountable only to the people of that State.

at 404) as a factor in determining whether the Compact Clause entity was entitled to Eleventh Amendment protection.

A view that a State entity loses Eleventh Amendment immunity where the financial impact of the suit might be ultimately softened by third party indemnity also conflicts with the classic formulation of what suits implicate sovereign immunity:

> The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.

Pennhurst, 465 U.S. at 101 n.11 (internal quotations omitted; quoting *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963)). As this formulation shows, suits implicate sovereign immunity in many circumstances besides those where a judgment would expend itself against the treasury. Thus, a suit against a government agency to compel it to take a certain course of action — even action that may have few fiscal effects — is barred by sovereign immunity absent a waiver.[21/]

[21/] In some circumstances, a plaintiff seeking only to compel a State to follow a particular course of action may avoid sovereign immunity by suing for injunctive relief against a State officer. *See Ex parte Young*, 209 U.S. 123 (1908). That tactic is not available, however, unless the plaintiff is asserting a federal right, *see Pennhurst*, *supra*, and the relief sought can fairly be characterized as a prospective remedy for continuing violation of law, not a retroactive remedy for a past harm, *see Edelman* v. *Jordan*, 415 U.S. 651 (1973), and *Papasan* v. *Allain*, 478 U.S. 265, 279-81 (1986). In this case, the Court would not have to address the scope of the *Ex parte Young* doctrine because the ruling below was based entirely on the majority's holding that the University was not protected by the Eleventh Amendment "in this particular instance." App. at 10a. We note in (continued...)

Furthermore, the classic formulation on sovereign immunity also demonstrates that the approach of Ninth, Fourth and Third Circuits focuses on the wrong issue: The issue is not whether the lawsuit *might* ultimately have a revenue-neutral effect on the "public treasury or domain" due to some offsetting claim of the State; the issue is whether the judgment itself would operate on the public domain. Here, there is no dispute that the plaintiff is seeking a judgment for money damages and reinstatement that would run against the University (which, under State law, is clearly part of the public domain). The federal government's reimbursement arrangement with the University does not alter this fact, as the judgment would not operate against federal government, but against the University. Furthermore, there is no legal certainty that federal government will, in fact, reimburse the University, given the qualifications that attach to the indemnification clause of the University's contract with DOE, including the need for continuing federal appropriations, *see supra*, at p. 4.[22/]

Finally, the position taken by the Ninth, Fourth and Third Circuits contradicts this Court's teaching in *Pennhurst* that "[i]t is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . .

[21/](...continued)
passing, however, that, if this Court reverses and holds that the University is entitled to Eleventh Amendment protection, Doe will not be able to bring his suit under the *Ex parte Young* doctrine. Doe's contract claims for damages and reinstatement would be barred by *Pennhurst* because those are state law claims, and Doe's § 1983 claims would be barred by *Edelman* and *Papasan*.

[22/] While the University does have a right to seek reimbursement from the federal government for the cost of any judgment, the plaintiff's suit is about more than just money: He is also seeking reinstatement under his breach of contract claim and, if he is successful in that claim, it will be the State, not the federal government, that will be ordered to employ him.

regardless of the nature of the relief sought." 465 U.S. at 100. Under the approach represented below, a State entity like the University — which is a constitutional branch of the California government coordinate with the legislative, executive and judicial branches — may be brought before a federal tribunal in a case for money damages, provided there is a prediction that the relief sought may ultimately not have too bad an effect on the State fisc. This is a major qualification of the immunity due components of State government, and it is not in accord with this Court's approach to the Eleventh Amendment.[23/]

2. The Practical Implications of the Ruling Below.

The importance of the issues presented in this case are highlighted by considering how the different approaches of the circuits apply in actual litigation. The position adopted by the Seventh, Fifth and Tenth Circuits, and argued by the dissent below, allows the Eleventh Amendment immunity of State entities to function like a true *immunity* from suit: If the State entity is sued in federal court, the entity can file a motion to dismiss, and the court can evaluate the claim of immunity as a matter of law. Where the defendant entity has previously been determined, under controlling circuit authority, to be part of the State, the case is dismissed. Where that determination has not yet been made, then the courts will have to evaluate whether the defendant entity is part of the State government. That determination, however, will not be specific to the facts of any one case and, once made, should be binding in all future cases, provided there is no change

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[23/] Diversity cases such as this case present an Eleventh Amendment problem even for those Justices that subscribe to the view that the Eleventh Amendment merely immunizes States against actions premised on diversity jurisdiction. *See Atascadero*, 473 U.S. at 247 (Brennan, J., dissenting); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring); *Seminole Tribe of Florida*, 116 S. Ct. at ___ (Souter, J., dissenting) (slip op. at 11-12). Even under that limited view of the Amendment, courts must still determine whether a suit is in fact against the State and therefore outside of federal diversity jurisdiction.

in the entity's basic position within the State government. *See* App. at 12a (Canby, J., dissenting) ("Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play [in determining immunity] should be put to rest.").

But the rule adopted by the majority below — that a State entity may lose its Eleventh Amendment immunity depending on a prediction of the ultimate financial impact of the suit — provides no true immunity from suit. A plaintiff will frequently, perhaps always, be able to hale any State entity into federal court and demand burdensome discovery on the entity's finances and on the likely financial impact of any particular suit. To maintain its Eleventh Amendment immunity, a State entity will then have to go through a fact-intensive mini-trial where the district court will, prior to trial on the merits, try to predict the ultimate financial impact of a particular suit. All State entities will be subject to this sort of burdensome mini-trial, even entities (such as the University here) that many courts have previously held to be a part of the State for Eleventh Amendment purposes, and the inquiry will involve highly sensitive matters of the entity's internal finances and its financial arrangements with third parties.

The problems with this latter approach were recognized by Judge Canby below, who warned that the majority's approach to determining Eleventh Amendment immunity raises the specter of "a judicial exercise that has no natural boundary." App. at 14a (Canby, J., dissenting). As Judge Canby noted:

> In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In

> this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

Id. Judge Canby aptly depicts a range of possible complications bound to arise in pretrial proceedings that attempt to determine the ultimate financial impact of a particular suit.[24/] If State entities can always be subjected to such proceedings, they have no real immunity from suit in federal court.

Nor is Judge Canby alone in his assessment of the burdens presented by tying Eleventh Amendment immunity to a prediction of the ultimate financial impact of the judgment. In *Paschal*, for example, the Seventh Circuit rejected the Fourth Circuit's *Brown* v. *Porcher* position because, *inter alia*, it would require courts "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" 936 F.2d at 944. And in *Doucette*, 947 F.2d at 29, the First Circuit noted that, in Circuits where a reimbursement exception to Eleventh Amendment has been recognized, district courts actually do have to conduct "a fact-specific inquiry" concerning the impact of judgment. Such factual inquires are inconsistent with the basic purpose of the Eleventh Amendment, which is to provide a threshold immunity from suit. *See Puerto Rico Aqueduct*, 506 U.S. at 147 (finding "little basis" to distinguish between the State and State entities because the

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[24/] In addition, an award of damages against the University could affect future University-DOE contracts. This is a very real, if immeasurable, consequence that demonstrates why Eleventh Amendment immunity should not turn on predictions of which entity will bear the cost of a judgment.

adjudication of Eleventh Amendment immunity should not "implicate[] any extraordinary factual difficulty").

To the extent that federal courts must make fact-intensive determinations concerning sources of funding for judgments against State entities, the courts can become entangled in a web of ancillary issues. Not only does this burden the federal courts, but it also imposes the prospect of continual litigation for State entities, because the ruling in one case that an entity is an arm of the State would never be *stare decisis* in the next case.

But an even worse procedural problem with the majority ruling below is presented by the limitations of *res judicata*: While a court may hold in the primary liability case that the State *should be* reimbursed by the federal government (or a private insurer), that ruling provides no guarantee to the State entity that it *will be* reimbursed. The ruling is clearly not binding on the federal government or on any other third party not represented in this case. Thus, the court's ruling below is merely a prediction of the likely financial impact of the suit, but it provides no certainty for the State. Even in this case, DOE's contractual obligation to indemnify the University is limited by a number of qualifications, the scope of which may be disputed by the government, and the obligation is also subject in its entirety to "the availability of funds appropriated from time to time by Congress." App. at 36a (Contract, Art. XVII, cl. 4(d)).

Granting certiorari in this case affords the Court an opportunity not only to resolve the circuit split identified above, but also to address an important issue of Eleventh Amendment immunity frequently confronted by the lower courts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 17, 1996

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No. 95 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR JOHN DOE, PHD., and all others similarly situated Plaintiffs-Appellants, vs LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director, Defendants and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants-Appellee	)	C 92-2284 SAW

Filed September 11, 1995

JUDGES Before: Herbert Y. C. Choy, William C. Canby, Jr. and Thomas G. Nelson, Circuit Judges. Opinion by Judge Choy; Dissent by Judge Canby.

CHOY, Circuit Judge:

Appellant, Dr. John Doe, Ph.D. ("Doe"), on behalf of himself and all others similarly situated, appeals the district court's dismissal of his breach of contract claim against the Regents of the

University of California ("University") and his § 1983 claim against John Nuckolls ("Nuckolls"), director of the Lawrence Livermore National Laboratory ("Laboratory") which is owned by the United States Department of Energy ("Department") and is operated by the University.

Doe is a mathematical physicist who signed an employment contract with the Laboratory. Doe contends that the Laboratory wrongfully refused to perform the contract of employment by peremptorily determining that Doe could not obtain a security clearance from the Department. The district court dismissed Doe's breach of contract claim against the Laboratory and the University because it held that the Laboratory and the University, as arms of the state, were immune from suit in federal court under the Eleventh Amendment. Doe appeals the district court's decision to grant Eleventh Amendment immunity to the University, as manager of the Laboratory.

Doe also appeals the district court's dismissal of his *42 U.S.C. § 1983* claim against Nuckolls, in his official capacity, and seeks reconsideration of his application for employment at the Laboratory without reference to security clearance matters. The district court dismissed the § 1983 claim because it determined that Nuckolls was not a "person" under § 1983 and thus was not liable for Doe's claim which sought relief solely for a violation alleged to have occurred in the past.

Having jurisdiction under *28 U.S.C. § 1291*, we reverse the district court's dismissal of Doe's breach of contract claim. We hold that the Eleventh Amendment does not immunize the University from suit in federal court because the University is not an "arm of the state" in this specific instance. We also reverse the dismissal of Doe's § 1983 claim against Nuckolls, in his official capacity, because Nuckolls is a "person" under § 1983 and is liable to suit for retrospective relief. We need not address the issue of whether reconsideration of Doe's employment constitutes prospective injunctive relief but remand to the district court for further proceedings in accordance with our holding.

I

Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. The Laboratory is a facility operated by the University under contract with the Department. Although the University controls all employment matters at the Laboratory, the Department exclusively handles security clearances for Laboratory employees.

Doe allegedly accepted the Laboratory's written offer of employment as a physicist in mid-June, 1991. The employment offer included a salary of $6,100 per month and required Doe to obtain a "Q" security clearance from the Department in a reasonable period of time after he became an employee of the Laboratory. Doe alleges that shortly after he accepted the employment offer, the Laboratory attempted to withdraw the offer, claiming that Doe could not obtain the required security clearance from the Department.

The contract between the United States of America ("Government") and the University for the management and operation of the Laboratory specifies that the Department, rather than the University, will pay the costs of any judgment rendered against the University in performing the contract, including all costs involved in litigation. Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48 ("Contract").

On June 18, 1992, Doe filed his initial complaint against the University, its president, David Gardner ("Gardner"), the Laboratory, and its director, Nuckolls.[1] The complaint contained a claim for breach of employment contract against the Laboratory,

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[1] The Department, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs) were also listed as defendants but were later dismissed with prejudice by stipulation on November 25, 1992.

the University, Gardner, and Nuckolls. In addition, the complaint contained a § 1983 claim against the Laboratory, the University, and Nuckolls and Gardner, in their official capacities, alleging deprivation of due process of law because unqualified personnel at the Laboratory peremptorily determined eligibility for a "Q" security clearance in violation of federal security clearance regulations. Finally, the complaint contained a claim for failure to enforce security regulations. On October 22, 1992, Doe amended his complaint to add allegations suing Nuckolls and three additional employees of the University, all in their individual capacities, for violation of § 1983.

On December 9, 1992, the defendants moved to dismiss Doe's § 1983 claim on the ground that the University and the Laboratory, as arms of the State, and Gardner and Nuckolls, in their official capacities, are not "persons" within the meaning of § 1983. In addition, the defendants sought to dismiss the three newly-added University employees and Nuckolls, in his individual capacity, on the ground that the statute of limitation period had run. Finally, Gardner and Nuckolls moved to dismiss Doe's breach of contract claim on the ground that neither was alleged to be party to the employment contract.

On February 5, 1993, the district court dismissed all claims against Gardner, the breach of contract claim against Nuckolls, and the § 1983 claim against the University, the Laboratory, the three University employees, and Nuckolls, in his official capacity. In its order, however, the district court noted that a plaintiff may assert a § 1983 claim against a state official, acting in her official capacity, if the plaintiff seeks prospective injunctive relief. Doe's breach of contract claim against the University and the Laboratory, and his § 1983 claim against Nuckolls, in his individual capacity, survived.

On April 7, 1993, Doe filed a second amended complaint which contained two claims. The first claim, against the Laboratory and the University, alleged breach of employment contract. Doe also brought a § 1983 claim, seeking declaratory

and prospective injunctive relief, against the University, the Laboratory, and Nuckolls, in his official and individual capacities. Finally, the second amended complaint added class action allegations.

On May 10, 1993, the defendants moved to dismiss Doe's breach of contract claim against the University and the Laboratory on the ground that they were immune from suit under the Eleventh Amendment. In addition, the defendants moved to dismiss Doe's renewed § 1983 claim against the University and the Laboratory on the ground that neither is a "person" within the meaning of § 1983. Finally, the defendants moved to dismiss Doe's § 1983 claim against Nuckolls, in his official capacity, insofar as the claim was based upon alleged past violations of law because Nuckolls is not a "person" for such retrospective § 1983 relief.

On June 24, 1993, the district court granted the motion to dismiss all aspects relevant to this appeal. The district court dismissed the breach of contract claim against the University and the Laboratory on Eleventh Amendment ground. The district court also dismissed the § 1983 claim against the University and the Laboratory, noting that the same claim already had been dismissed in its February 5, 1993 order. Finding that the relief Doe sought - reconsideration of his employment application - did not constitute prospective injunctive relief, the district court dismissed Doe's § 1983 claim against Nuckolls in his official capacity. The district court entered a final judgment on September 16, 1993, and Doe timely filed a notice of appeal on September 22, 1993.

II

Doe contends that the district court erred when it dismissed his breach of employment contract claim against the University, as manager of the Laboratory, on the ground that the Eleventh Amendment of the United States Constitution grants the University immunity from suit in federal court. A determination of a state's immunity from suit under the Eleventh Amendment is a question

of law which is reviewed *de novo*. *BV Eng'g v. University of Cal., L.A., 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has extended the reach of the Eleventh Amendment to bar federal courts from presiding over any suit in which a state or "arm of the state" is a defendant. *State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199, 73 L. Ed. 262, 49 S. Ct. 104 (1929)*. However, "not all state-created or state-managed entities are immune from suit in federal court. . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*.

We apply a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court. *See Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988)* (considering the source of funding for California state colleges and universities to determine whether they are protected by Eleventh Amendment immunity), cert. denied, *490 U.S. 1081 (1989)*. The five factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993).

State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state. *Durning, 950 F.2d at 1424*. We must evaluate "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." Id. We conclude that this factor weighs against granting the University Eleventh Amendment immunity from suit in federal court. The Contract makes clear that the Department, and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract. "When a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity under the arm of the state doctrine . . . ." *Id. at 1425-26*.

The second factor, whether the University performs central government functions, weighs in favor of finding that the University is an arm of the state and granting it Eleventh Amendment immunity. In analyzing this factor, we look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory. *See id.* at 1426. We look to the way California law treats the University in order to assess whether the University performs central government functions. *Id. at 1423*. The California State Attorney General has stated that the University is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive." *30 Ops. Cal. Att'y Gen. 162, 166 (1957)*. California case law also clearly recognizes the University as a branch of the state government. See *Ishimatsu v. Regents of*

Univ. of Cal., 266 Cal. App. 2d 854, 72 Cal. Rptr. 756, 762-63 (Cal. Ct. App. 1968); Regents of Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978). Finally, the California Education Code defines the University's mission, accords the University with exclusive jurisdiction over education in certain professions, and allocates to it the primary responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1995). The regulation of public education is an important central government function, thus the second factor weighs in favor of granting immunity to the University.

The University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity. The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with the legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." Id. Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

The district court erred when it relied upon *Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir. 1989)* (holding that the University was immune from a civil rights suit in federal court where the State of California would have been ultimately responsible for payment of the judgment) and *Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)* (stating in dictum, that the University was an instrumentality of the state), to rule that the University is always immune from suit in federal court.

The district court should have applied the five-factor analysis to this unique situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257, 79 L. Ed. 343, 55 S. Ct. 197 (1934); Thompson, 885 F.2d at 1443; B.V. Eng'g, 858 F.2d at 1395* (citing *Jackson, 682 F.2d at 1350); Vaughn v. Regents of the Univ. of Cal., 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981).* However, previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation. *Vaughn, 504 F. Supp. at 1352-54* (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than blindly asserting immunity).

The University is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions. See, e.g. *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 940 (Fed. Cir. 1993)* (recognizing that Congress has abrogated the University's immunity from suit in federal court for violation of patent law), cert. denied, *114 S. Ct. 1126 (1994); In re Holoholo, 512 F. Supp. 889, 901-02 (D. Haw. 1981)* (finding that the University waived its Eleventh Amendment immunity by signing a government contract that contemplated possible suits against it in federal court and by entering into a federally regulated area), superseded by statute, not in relevant part, as stated in, *Bator v. Judiciary, Adult Probation Div., 1992 U.S. Dist. LEXIS 22214* (D. Haw. May 20, 1992). The source of funding in each situation, in addition to the four other factors for determining Eleventh Amendment immunity, must be examined closely to ascertain that the University is indeed functioning as an arm of the state.

The University argues that the district court in *Holoholo, 512 F. Supp. at 895,* held that the University is an arm of the state despite an indemnification provision similar to the one in the Contract in this case. The district court in that case held that "since the [University] depends upon appropriations by the California Legislature, any damages awarded against the [University] would, absent insurance or other indemnification, come from the state treasury." *Id. at 895* (emphasis added). In making that statement, the district court had not considered the specific indemnification provision in the contract between the University and the United States and later acknowledged that "the exact nature and extent of the indemnification are not clear[,]" but that the indemnification provision "could render the Eleventh Amendment inapplicable to these state defendants [including the University]." *Id. at 899 n.14.*

After applying the five-factor analysis, we find that the University, acting in a managerial capacity for the Laboratory, has not satisfied the burden of proving that it is entitled to Eleventh Amendment immunity. Because we hold that the University, in this specific instance, is not entitled to Eleventh Amendment immunity from suit in federal court, we need not address whether the University has waived or Congress has abrogated the University's immunity. See *BV Eng'g, 858 F.2d at 1396.*

III

Doe next contends that the district court erred when it dismissed his § 1983 claim against Nuckolls, in his official capacity. We have determined that the University is not protected by the Eleventh Amendment from suit in federal court because the University, in this particular instance, is not functioning as an arm of the state. Because we hold that the University is not an arm of the state in this instance, it is a "person" under § 1983. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989);* see also *Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652, 654* (N.J.), cert. denied, *488 U.S. 826*

(1988). Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a "person" who is fully liable under § 1983. See *Thompson, 885 F.2d at 1442-43* ("only those governmental entities which are 'persons' within the meaning of § 1983 can be held liable under § 1983.").

Because we hold that the University and Nuckolls, acting in his official capacity, are fully liable to suit under § 1983, we need not address the question of whether reconsideration of Doe's employment by the Laboratory constitutes prospective injunctive relief. Doe may sue both the University and Nuckolls in federal court regardless of whether the relief he seeks constitutes prospective or retrospective relief. We remand to the district court for further proceedings in accordance with our ruling. We deny Doe's request for attorney's fees because the defendants brought forth a legitimate argument on the basis of Eleventh Amendment immunity.

REVERSED and REMANDED.

CANBY, Circuit Judge, dissenting:

With all respect to the majority, I disagree with its conclusion that the Eleventh Amendment does not bar this action against the University and its officers acting in their official capacities.

As the majority opinion recognizes, we have previously held that the University of California is an arm of the California State Government entitled to Eleventh Amendment immunity from suit in federal court. E.g., *Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989)* ("It has long been established that UC is an instrumentality of the state for purposes of the Eleventh Amendment"); *BV Engineering v. Univ. of Calif., Los Angeles, 858 F.2d 1394, 1395 (9th Cir. 1988),* cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989).* In my view, these cases are controlling, and there is no call to reassess

the status of the University in the absence of a change in its structure. If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived. *BV Engineering, 858 F.2d at 1396.*

The majority, however, does decide anew the question of the University's immunity. In so doing, it reaches an incorrect result. The majority applies a five-factor test that originated in *Mitchell v. Los Angeles Community College District, 861 F.2d 198, 201 (9th Cir. 1988),* cert. denied, *490 U.S. 1081 (1989),* and was repeated in *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991),* and *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993).* The listed factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 1292. The majority here agrees that factor [2] favors immunity; the University has long been recognized as performing functions of the central government. The majority states, however, that factors [3], [4], and [5] work against immunity, because the University may sue or be sued, may take property in its own name, and enjoys corporate status. But none of these three attributes of the University of California has changed since we held it to be entitled to Eleventh Amendment immunity. Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play should be put to rest.

The crux of the majority's decision, as its opinion states, lies in the first factor. "The source from which the sums sought by the plaintiff must come is the most important single factor in

determining whether the Eleventh Amendment bars federal jurisdiction." *Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981),* aff'd sub nom. *Kush v. Rutledge, 460 U.S. 719, 75 L. Ed. 2d 413, 103 S. Ct. 1483 (1983).* In my view, however, this factor must be viewed as a legal, not an economic matter. "The question is whether the state treasury is legally obligated." *Durning, 950 F.2d at 1425 n.3.*

No one has disputed that a judgment against the University of California is a legal obligation of the State of California. The majority opinion concludes, however, that the agreement of the United States to "indemnify and hold the University harmless against any . . . judgment or liability" arising out of its management of the Laboratory changes the Eleventh Amendment analysis. But that contractual clause is a separate matter. A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Several of our decisions establish that Eleventh Amendment immunity turns on the formal legal liability of the State, and not the economic impact of the judgment. In *Markowitz v. United States, 650 F.2d 205, 206 (9th Cir. 1981),* we held that a State was entitled to Eleventh Amendment immunity even if it had liability insurance that would ultimately pay the judgment. It is true that part of our reasoning was that state funds pay the insurance premiums, id., but the same indirect economic consequences are present here. If the United States did not agree to indemnify the University, the University's charge for managing the Laboratory would have to be higher. Lower receipts by the University are a form of insurance premium payment to the United States.

Conversely, the fact that a State volunteers to pay a judgment incurred by an agency does not create Eleventh Amendment immunity because the question is whether the state has a legal

liability to pay the judgment. *Durning, 950 F.2d at 1425, n.3.* Indeed, a suit against an individual officer does not become a suit against the State for Eleventh Amendment purposes even if a state statute provides that the officer may sue the State to recover indemnity. *Blaylock v. Schwinden, 862 F.2d 1352, 1353-54 (9th Cir. 1988); Demery v. Kupperman, 735 F.2d 1139, 1147-48 (9th Cir. 1984),* cert. denied, *469 U.S. 1127 (1985).* The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought. Here it is the State.

One difficulty with taking the federal indemnity agreement into account is that it is a judicial exercise that has no natural boundary. In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

I would avoid all of these difficulties, first, by relying on our established precedent holding that the University of California is entitled to Eleventh Amendment immunity. If I failed in that approach, I would hold that the first Mitchell factor rendered the University immune, because the judgment sought against it would be a legal liability of the State. The University officials being sued in their official capacity would then share in the Eleventh Amendment immunity of the State. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).* The result would be to affirm the judgment of the district court that the Eleventh Amendment bars it from entertaining this action.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DR JOHN DOE, PHD. Plaintiff, vs UNIVERSITY OF CALIFORNIA, et al., Defendants.	)	C 92-2284 SAW JUDGMENT

Filed September 13, 1993

In accordance with the *Memorandum and Order* of September 2, 1993,

IT IS HEREBY ADJUDGED that Plaintiff's claim for breach of contract against Defendant University of California and Plaintiff's claim under 42 U.S.C. Section 1983 against Defendant John Nuckolls in his official capacity are dismissed.

September 13, 1993

/s/ Stanley A. Weigel
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	)	
Plaintiffs,	)	
	)	No. C-92-2284 SAW
vs.	)	
UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS,	)	

Decided and Filed September 2, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe is a mathematical physicist who alleges that he was offered and accepted a position as a physicist with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because LLNL and its personnel concluded that Doe could not obtain a Department of Energy security clearance — a requirement for employment with LLNL.

Based on the foregoing allegations, on April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-

action complaint against Defendants for breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim").[1] On June 23, 1993, upon motion by Defendants, the Court dismissed Plaintiffs' Section 1983 claim against Defendants University of California ("UC") and LLNL, and Doe's Section 1983 claim against John Nuckolls in his official capacity. The Court further dismissed Plaintiffs' breach of contract claim against UC and LLNL.

Doe moves to certify for appeal, under Fed. R. Civ. P. 54(b), two of the dismissed claims: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In the alternative, Doe moves to certify for appeal these claims under 28 U.S.C. § 1292(b). Doe further moves to stay all proceedings pending the appeal. Defendants oppose the motions for certification.

II. DISCUSSION

A. Motion for Certification Under Rule 54(b)

As noted above, Doe seeks to appeal two claims dismissed in the Court's June 23, 1993 Memorandum and Order: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In order to do so, Doe seeks a final judgment on these claims pursuant to Federal Rule of Civil Procedure 54(b).

The district court has broad discretion to enter final judgment of particular claims under Rule 54(b) and to facilitate an appeal of those claims if there is no just reason for delaying the appeal. Fed. R. Civ. P. 54(b); *see also Texaco, Inc. v. Ponsdolt*, 939

[1] Doe voluntarily dismissed the original complaint, filed June 17, 1992. On February 5, 1993, the Court dismissed in most respects Doe's first amended complaint. On March 25, 1993, the Court granted Doe's motion to file the second amended complaint.

F.2d 794, 798 (9th Cir. 1991). In considering a Rule 54(b) motion, the court should adopt a pragmatic approach, focusing on the severability of the dismissed claims from the remaining claims and efficient judicial administration. *Texaco*, 939 F.2d at 798; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Under the circumstances of this case, a Rule 54(b) final judgment of the dismissed breach of contract claim against UC and Section 1983 claim against Nuckolls in his official capacity is proper. First, the dismissed claims are severable from the remaining claims. The dismissed claim against Nuckolls in his *official* capacity is solely for *injunctive* relief. The only remaining claim brought by Doe is against Nuckolls in his *individual* capacity and only for *damages*. The dismissed claim against UC is a relatively straightforward breach of contract claim. There are no remaining claims against UC. There is a remaining claim against Nuckolls in his official capacity for injunctive relief, but that claim is brought by the class — which has yet to be certified.

Second, entering final judgment of the claim would result in efficient judicial administration. Doe has stated that he desires to remain in federal court, "but can sensibly do so only" if the federal court has jurisdiction to consider the breach of contract claim against UC. *See* Brief Supporting Motion for Stay and for Certification to Appeal 2. Presumably, if Doe loses on appeal, he will refile the complaint in state court. Therefore, by certifying the claims for appeal, the Court may be prevented from expending judicial resources in adjudicating the remaining claims, which would be rendered moot if Plaintiffs proceed in state court.

In light of the foregoing, the Court can find no just reason for delaying appeal on Plaintiffs' breach of contract claim against UC and Doe's Section 1983 claim against Nuckolls in his official capacity. Accordingly, Doe's motion to certify these claims under Rule 54(b) is granted.[2]

B. Motion for Stay Pending Appeal

Doe moves to stay the Court proceedings pending resolution of the certified appeal by the Ninth Circuit.

If a district court certifies claims for appeal pursuant to Rule 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so. *See Matek v. Murat*, 638 F. Supp. 775, 784 (C.D. Cal. 1986). As noted above, it is presumed that if Plaintiffs lose on appeal, they will refile the action in state court. Accordingly, the interests of efficiency and fairness are served by staying further proceedings in this Court because the remaining claims would be rendered moot if Plaintiffs proceed in state court. Moreover, Defendants do not object to Doe's request for a stay. *See Armstrong v. A.C. & S., Inc.*, 649 F. Supp. 161, 162 (W.D. Wash. 1986) (motion for stay granted if motion unopposed). For the foregoing reasons, Doe's motion to stay is granted.

Accordingly, it is HEREBY ORDERED that:

(1) Pursuant to Federal Rule of Civil Procedure 54(b), the Clerk of the Court shall enter judgments of dismissal as to Plaintiffs' claim for breach of contract against Defendant University of California and Plaintiff Doe's claim under 42 U.S.C. § 1983 against Defendant John Nuckolls in his official capacity;

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[2] Because the Court grants Doe's motion for certification under Rule 54(b), his alternative motion for certification under 28 U.S.C. § 1292(b) is denied, as being moot.

(2) All proceedings in this action in this Court are stayed pending decision by the Ninth Circuit on the appeal of the foregoing claims; and

(3) Commencing ninety (90) days from now, Plaintiff Doe shall report to the Court the status of said appeal and shall do so every thirty (30) days thereafter.

Dated: September 2, 1993.

/s/ Stanley A. Weigel
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	No. C-92-2284 SAW
UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS,	)	

Decided June 23, 1993
Filed June 24, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, Ph.D, is a mathematical physicist who alleges that he was offered and accepted a position with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because they concluded that Doe could not obtain a U.S. Department of Energy security clearance — a requirement for LLNL employment.

On April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-action complaint alleging breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"). Defendants move to dismiss the Section 1983 claim against Defendants University of California ("University"), LLNL, and John Nuckolls in his official capacity. Defendants further move to dismiss the breach of contract claim against the University and LLNL. Plaintiffs oppose the motions.

II. DISCUSSION

A. Motion to Dismiss Section 1983 Claim Against the University and LLNL

On February 5, 1993, the Court held that "governmental entities which are considered 'arms of the state' for Eleventh Amendment purposes are not 'persons' within the meaning of Section 1983, and are thus not subject to Section 1983 liability." (Citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989)). The Court further held that because the University and LLNL are "arms of the state" they are not subject to Section 1983 liability. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against the University and LLNL. *See* February 5, 1993 Memorandum and Order ("February 5 Order"), at 3.

Nonetheless, contrary to the Court's order, Plaintiffs appear to have again alleged, in the second amended complaint, a Section 1983 claim against the University and LLNL. For the reasons stated above, the Court must dismiss Plaintiffs' Section 1983 claim against these defendants.

B. Motion to Dismiss Section 1983 Claim Against John Nuckolls in his Official Capacity

On February 5, 1993, the Court held that "suits against officials in their official, as opposed to individual, capacities are

not suits against 'persons' within the meaning of Section 1983," and are thus not subject to Section 1983 liability. (Citing *Will*, 491 U.S. at 70-71.) The Court further held that because Nuckolls was being sued in his official capacity, he is not subject to Section 1983 liability. Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against Nuckolls in his official capacity. *See* February 5 Order, at 3.

The Court noted in footnote 7 of the February 5 Order an exception to the rule disallowing Section 1983 claims against persons acting in their official capacity — where a plaintiff seeks prospective injunctive relief. (Citing *Quern v. Jordan*, 440 U.S. 332, 337 (1978). The Court held the exception inapplicable to Nuckolls because Doe had not prayed for such relief.

Attempting to utilize the prospective injunctive relief exception, Plaintiffs filed a second amended complaint which prays for a court order requiring Nuckolls, in his official capacity, to hire Doe at LLNL in accordance with the alleged employment contract. *See* Second Amended Complaint, at 7 ¶ (5). Plaintiff further prays for a court order requiring Doe's "application for employment at the LLNL to be reconsidered without reference to his perceived eligibility for a [Department of Energy] security clearance." Second Amended Complaint, at 7 ¶ (6).

Plaintiff's attempt is not well-taken. The Court has already held that "an injunction which would require Nuckolls to employ [Doe] at LLNL is not prospective injunctive relief because such relief relates solely to an alleged past violation of federal law." *See* March 25, 1993 Memorandum and Order ("March 25 Order") at 3. (Citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Further, because an injunction requiring Nuckolls to reconsider Doe's application also "relates solely to an alleged past violation of federal law," it too is not prospective injunctive relief. *See Papasan*, 478 U.S. at 277-78; *Green*, 474 U.S. at 68. Accordingly, Doe's Section 1983

claim against Nuckolls in his official capacity[1] must be dismissed.[2] *See Will*, 491 U.S. at 70-71.

C. Motion to Dismiss Breach of Contract Claim Against the University and LLNL

Defendants assert that the Eleventh Amendment bars Plaintiffs' breach of contract claim against the University and LLNL. Defendants' assertion is well-taken.

The Eleventh Amendment bars a citizen from bringing suit in federal court against their own state or "arms of the state." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1984); *Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991). The Eleventh Amendment does not bar such suits, however, if: (1) the state waives its immunity and consents to be sued in federal court; or (2) Congress creates a cause of action for damages against an unconsenting state. *See BV Eng'g v. University of Cal.*, 858 F.2d 1394, 1395-96 (9th Cir. 1988).

The Court has held that the University and LLNL are "arms of the state" for Eleventh Amendment purposes. *See* February 5 Order, at 3. The Court has also held that California has not waived its immunity and consented to be sued in federal court. *See* March 25 Order, at 3 n.5. Further, Plaintiffs' breach of contract claim is a state cause of action, not one which is congressionally created. Accordingly, because the Eleventh Amendment bars Plaintiffs' suit against the University and LLNL,

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[1] Because Plaintiffs' claim against Nuckolls in his individual capacity is not barred by Section 1983, it is not dismissed. *See Hafer v. Melo*, 112 S. Ct. 358 (1991).

[2] Because members of the class (other than Doe) do seek prospective injunctive relief, their Section 1983 claim against Nuckolls in his official capacity is not dismissed.

the breach of contract claim against these defendants must be dismissed. *See BV Eng'g*, 858 F.2d 1394.[3]

Accordingly, IT IS HEREBY ORDERED that:

(1) Plaintiffs' Section 1983 claim against the University and LLNL is DISMISSED with prejudice;

(2) Plaintiff Doe's Section 1983 claim against John Nuckolls in his official capacity is DISMISSED with prejudice; and

(3) Plaintiffs' breach of contract claim against the University and LLNL is DISMISSED with prejudice.

Dated: June 23, 1993.

/s/ Stanley A. Weigel
Judge

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[3] Doe requests that if the Eleventh Amendment bars Plaintiffs' claims in federal court, the Court transfer the case to state court rather than dismiss it. Doe cites no support for this request, and the Court finds no such precedent. Doe's request is accordingly denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	No. C-92-2284 SAW
vs.	)	
	)	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, CLARK GROSECLOSE, ROBERT PERRET, ROBERT PERKO, UNIVERSITY OF CALIFORNIA, DAVID GARDNER,	)	
Defendants.	)	

Decided and Filed February 5, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, PhD.,[1] is a mathematical physicist. Plaintiff alleges that he was offered, and in June of 1991, accepted, a position as a physicist at Defendant Lawrence

[1] Plaintiff asserts that he cannot sue in his own name because "to do so would cause him to be barred from essentially all professional employment."

Livermore National Laboratory ("Lab"). The Lab is operated by the University of California ("UC") under contract with the U.S. Department of Energy ("DOE").[2] The offer for employment included a salary of $6,100 per month and a requirement that Plaintiff obtain a security clearance from DOE.[3] Plaintiff further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because the Lab and its personnel concluded that Plaintiff could not obtain a security clearance from DOE.

On October 22, 1992, Plaintiff filed his first amended complaint, alleging breach of employment contract against Defendants Lab, Nuckolls, UC, and Gardner; and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"), against Defendants Lab, Nuckolls, Groseclose, Perret, Perko, UC, and Gardner.[4] Defendants Nuckolls and Gardner move to dismiss the breach of contract claim against them on the ground that they are not parties to an employment contract with Plaintiff.[5] Defendants UC, Lab, Gardner, and Nuckolls move to

[2] Defendant John Nuckolls is Director of the Lab. Defendant David Gardner is President of UC. Defendants Clark Groseclose, Robert Perret, and Robert Perko are employed by UC at the Lab.

[3] Plaintiff asserts that the employment contract provided him a "reasonable period of time after he became an employee" of the Lab in which to obtain a security clearance. Defendants disagree, asserting that the employment offer was "conditioned upon Plaintiff's being able to obtain the requisite security clearance."

[4] Plaintiff also alleged failure to enforce security regulations against federal Defendants DOE, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs). On November 25, 1992, the parties agreed to dismiss, with prejudice, all causes of action against the federal defendants.

[5] Plaintiff concedes that only UC may be liable for the breach of employment contract claim. Accordingly, Nuckolls and Gardner's motion to dismiss the contract claim against them is granted.

dismiss the Section 1983 claim on the ground that they are not "persons" within the meaning of 42 U.S.C. § 1983. Defendants Groseclose, Perret, Perko, and Nuckolls move to dismiss the Section 1983 claim on the grounds that it is barred by the statute of limitations and it fails to state a claim upon which relief can be granted.

II. DISCUSSION

A. The Meaning of "Person" Under Section 1983

Defendants Lab, UC, Nuckolls, and Gardner assert that they must be dismissed from the Section 1983 claim for relief because they are not "persons" within the meaning of 42 U.S.C. § 1983.[6]

States, and governmental entities which are considered "arms of the state" for Eleventh Amendment purposes are not "persons" within the meaning of Section 1983, and are thus not subject to Section 1983 liability. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). UC is an arm of the state for purposes of the Eleventh Amendment. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). Accordingly, Defendants UC and Lab (an entity operated by UC) are not "persons" within the meaning of Section 1983, and Plaintiff's Section 1983 cause of action against them is dismissed.

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[6] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Suits against officials in their official, as opposed to individual, capacities are not suits against "persons" within the meaning of Section 1983. *Will*, 491 U.S. at 70-71. Because Defendants Gardner and Nuckolls are being sued in their official capacities, they are not "persons" within the meaning of Section 1983 and therefore Plaintiff's Section 1983 cause of action against them in their official capacities is dismissed.[7] Because Defendant Nuckolls has also been sued in his individual capacity, Plaintiff's Section 1983 cause of action against him in this capacity is not barred under Section 1983. *See Hafer v. Melo*, 112 S.Ct. 358 (1991).

B. Statute of Limitations Under Section 1983

Defendants Groseclose, Perret, Perko, and Nuckolls assert that the Section 1983 claims against them are barred by the statute of limitations. The statute of limitations for a Section 1983 action brought in California is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

Plaintiff's initial Complaint, filed June 18, 1992, alleges that Defendant Nuckolls, in his official capacity, denied Plaintiff due process and violated federal law by refusing to employ Plaintiff at the Lab in July of 1991. Plaintiff's First Amended Complaint, filed October 22, 1992 (more than one year after the actions complained of occurred), alleges the same violations against new Defendants Groseclose, Perko, and Perret, in their individual capacities, and adds Defendant Nuckolls in his individual capacity. Thus, unless the claims alleged in the First Amended Complaint "relate back" to the initial Complaint, Plaintiff's 1983 claims against these persons are time-barred.

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[7] One exception to the rule disallowing Section 1983 claims against persons sued in their official capacities is where the plaintiff seeks prospective injunctive relief. *See Quern v. Jordan*, 440 U.S. 332, 337 (1978). This exception is not applicable here, however, because Plaintiff has not prayed for such relief.

1. Defendants Groseclose, Perret, and Perko

Under Fed. R. Civ. P. 15(c), an amended complaint which names new parties will relate back to the date of the original complaint if three conditions are met. First, the claims asserted in the amended complaint must have "arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, the party to be named by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Third, the party to be named by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Tafari v. Chevron Corp.*, 1992 U.S. Dist. LEXIS 19085 (N.D. Cal. 1992) (quoting Fed. R. Civ. P. 15(c)).

Plaintiff has submitted no evidence that Defendants Groseclose, Perret, or Perko knew or should have known that, but for Plaintiff's mistake concerning their identities, the initial complaint would have been brought against them. Indeed, Plaintiff has not even alleged that a mistake was made when the initial complaint was filed. Because Plaintiff has not met the third condition required by Fed. R. Civ. P. 15(c), the Section 1983 claims brought against Defendants Groseclose, Perret, and Perko in First Amendment Complaint do not relate back to the initial Complaint, and are therefore time-barred. *See Hill v. Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991) (quoting *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)) ("[A] new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.")

2. Defendant Nuckolls

Unlike Defendants Groseclose, Perret, and Perko, however, Defendant Nuckolls was named in the initial complaint. The initial complaint named Defendant Nuckolls in his official

capacity, and the First Amended Complaint merely added Nuckolls as a Defendant in his individual capacity.

According to the Advisory Committee Note to the 1991 amendments to Rule 15(c), "the rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." The amendment aims to protect a plaintiff from a statute of limitations defense "where the original complaint sues the correct party but identifies him by a technically incorrect name." *Hill*, 924 F.2d at 1374 n.2. Such is the case here. Defendant Nuckolls was properly identified in the initial Complaint but was incorrectly named in his official capacity, rather than in his individual capacity. *See id.* As a Defendant in the initial Complaint, Nuckolls had notice of Plaintiff's claims against him within the limitations period. Accordingly, the Section 1983 claim brought against Defendant Nuckolls in his individual capacity relates back to the initial Complaint, and is therefore not time barred. *See id.*; *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980).

C. Failure to State a Claim Under Section 1983

A district court may dismiss a complaint or claim for relief if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Nonetheless, such motions to dismiss are disfavored and rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Upon consideration of such a motion, the court must consider the pleadings in a light most favorable to plaintiff. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

Defendants assert that, notwithstanding a statute of limitations defense, Plaintiff's Section 1983 claims must be dismissed because they fail to state a claim upon which relief can be granted. Specifically, Defendants assert that the "right" which Plaintiff alleges he was deprived of (a DOE security clearance) is not recognized by law as a "right," citing *Department of the Navy v.*

Egan, 484 U.S. 518, 528 (1988) ("[N]o one has a "right" to a security clearance."). Defendants further assert that Plaintiff does not have a property interest sufficient to entitle Plaintiff to procedural due process.

Defendants' argument is not well-taken. First, Plaintiff sues not for a deprivation of a right to a security clearance, but rather alleges that he was "deprived of his constitutional right to (procedural) due process of law in the determination of his eligibility for a DOE security clearance." Plaintiff's Brief Opposing Motion to Dismiss, at 6. An analogous claim has been recognized by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 502 (1958) ("[E]xecutive agenc[ies are not empowered] to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest.") Considering Plaintiff's allegations in a light most favorable to him, he may be able to state a cause of action based on the reasoning in *Greene*. Similarly, Plaintiff may be able to show that he is a party to a valid employment contract, and thus has a property interest sufficient to entitle him to procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971) (university employees dismissed during the terms of their contracts have interests in continued employment which are safeguarded by due process). Accordingly, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

Accordingly, IT IS HEREBY ORDERED that:

(1) All Plaintiff's causes of action against Defendant Gardner are dismissed;

(2) Plaintiff's breach of contract cause of action against Defendant Nuckolls is dismissed;

(3) Plaintiff's Section 1983 cause of action Defendant Nuckolls in his official capacity is dismissed;

(4) Plaintiff's Section 1983 cause of action against Defendants UC, Lab, Groseclose, Perret, and Perko is dismissed;

Dated: February 5, 1993.

/s/ Stanley A. Weigel
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, Ph.D., and all others similarly situated,	)
	) No. 93-16792
Plaintiffs-Appellants,	)
	) D.C. No. CV-92-02284-SAW
	) Northern District of California
v.	)
	)
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,	) ORDER
Defendants,	)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)
Defendant-Appellee.	)

Filed January 19, 1996

Before: CHOY, CANBY AND T.G. NELSON, Circuit Judges.

There having been no objection made by appellants Dr. John Doe, Ph.D., et al., to the request made by appellees John Nuckolls and the University of California that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby GRANTED.

A majority of the panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Modification No. M205, Supplemental Agreement to Contract to Contract No. W-7405-ENG-48:

ARTICLE XVII, CL. 4 - GENERAL INDEMNITY (SPECIAL)

(a) DOE deems the performance of the work hereunder by the University to be essential in the interest of the common defense and security of the United States. DOE and the University recognize that, in part, this work involves unusual, unpredictable and abnormal risks.

(b) In view of these circumstances, it is agreed that all work under this contract is to be performed at the expense of the Government and that the University shall not be liable for the Government shall indemnify and hold the University harmless against any delay, failure, loss or damage, judgement or liability (including personal injuries and deaths of persons and damage to property) and any expenses in connection therewith (including costs of damages, costs and expense of litigation and claims) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work. It is understood that the Government is obligated under this paragraph (b), whether or not any employee of the University is responsible therefor, unless any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract.

(c) The Government shall pay directly and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and, when requested by the University, all

claims which may be settled by agreement and approved by the Contracting Officer.

(d) The obligations of DOE under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress. To the extent that funds are not available for payments under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," DOE will use it best effort to obtain such funds.

(e) In the event that circumstances arise in the course of the work under this contract which could expose the University to financial liability arising from unusually hazardous or nuclear risks for which adequate protection is not provided under the terms of this contract, DOE agrees to consider in good faith a request from the University for indemnification against such risks under Public Law 85-804, in accordance with the procedures prescribed in Subpart 50.4 of the FAR and the no gain/no loss principle set forth in Article VI, Clause 2, of this contract.

(3)

No. 95 - 1694

IN THE
Supreme Court of the United States
October Term, 1995

THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, et al.,

Petitioners,

v.

JOHN DOE, PH.D., and all others
similarly situated,

Respondents.

ON PETITION FOR A
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record:
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Five Lindsay Circle
San Francisco, CA 94124
(415) 821-1716

Attorney for Respondents

43 pp

QUESTIONS PRESENTED

(Respondents disagree with Petitioners' statement of the questions presented.)

1. Whether the Eleventh Amendment applies to the unique facts of this case, in which the United States Department of Energy will ***pay directly*** — not merely reimburse later — any damages awarded against the Regents of the University of California (as manager of the Lawrence Livermore National Laboratory).

2. Whether this case, with its unique factual setting, is a proper vehicle for resolving any conflicts that may exist among circuits in cases with distinctly different factual settings involving reimbursement, insurance, or the actual impact of judgments on state treasuries.

3. Whether, in an action under 42 U.S.C. § 1983, federal court protection of federal civil rights relating to federal security clearance procedures should be sacrificed to simplify Eleventh Amendment jurisprudence.

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OPPOSITION TO THE PETITION

Respondents JOHN DOE, Ph.D., and all others similarly situated, respectfully ask this Court to deny the Petition of the Regents of the University of California for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

1. ***Basis for Federal Jurisdiction in the District Court.***

Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343(a) for civil rights actions arising under the Constitution and laws of the United States (federal security clearance regulations and 42 U.S.C. § 1983) and on 28 U.S.C. § 1332 for actions based on diversity of citizenship (breach of employment contract).

2. ***Material Facts***

Respondents strongly disagree with Petitioners' characterization of this case as a "contract action" (Petition for Certiorari ("Pet.") at 2). This is primarily a federal civil rights action under 42 U.S.C. § 1983 for violation of Plaintiffs' rights secured by the due process clause of the Fifth Amendment and DOE security clearance procedural regulations. Plaintiff Doe, a mathematical physicist, alleges that after he had accepted the offer of employment at the Lawrence Livermore National Laboratory ("LLNL"), the LLNL attempted to withdraw the offer and refused to employ him in any position. The LLNL did so because its personnel determined that Doe could not obtain a security clearance from the DOE in any period of time, reasonable or otherwise (Second Amended Complaint, ¶ 10). Plaintiffs further allege that federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR), provide that only the DOE may determine eligibility for a DOE security clearance, not any other entity such as the LLNL or its employees (Second Amended Complaint ¶ 11; see also App. at 4a-5a).

Plaintiffs also allege that the LLNL, Nuckolls, and the University of California have an ongoing and continuing policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of the foregoing federal law (Second Amended Complaint, ¶ 13).

In addition to his civil rights claim, Plaintiff Doe also alleged a diversity breach of contract claim, since he resides in New York (Second Amended Complaint, ¶¶ 18, 19, 4). However, the foundation of this action is the violation of federal civil rights, proof of which would entitle Plaintiffs to judgment, even if the University successfully withdrew its offer of employment to Doe. (Federal jurisdiction over the breach of contract claim is also provided by 28 U.S.C. § 1367(a) on supplemental jurisdiction.)

Petitioners correctly state that the District Court dismissed Doe's action against the University based on the Eleventh Amendment and that the Ninth Circuit reversed, focusing on a provision for indemnification in the agreement between the federal government and the University for operation of the LLNL (Pet. at 2-3). Erroneously equating indemnification with reimbursement, Petitioners fail to observe the true nature of that provision.[1]

Crucial to the Ninth Circuit's decision are the details of the indemnification provision, found in the "Contract

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[1] For example, section 2778 of the Civil Code of California distinguishes two kinds of indemnity: "1. Upon an indemnity against liability ..., the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims or demands, or damages, or costs ..., the person indemnified is not entitled to recover without payment thereof;"

between the United States of America and the Regents of the University of California (For the Management and Operation of the Lawrence Livermore National Laboratory), Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48." "Article XVII, CL. 4 - General Indemnity (Special)" thereof defines the manner in which the DOE will indemnify the University. (Petitioners' Appendix ("App.") at 36a-37a.) Subdivision (c) of the quoted clause provides as follows:

> (c) The Government shall ***pay directly*** and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and, when requested by the University, all claims which may be settled by agreement and approved by the Contracting Officer. [emp. added.]

"Pay[ing] directly" is not a form of reimbursement, as Petitioners repeatedly argue (Pet. at i, 9, 12, 14, 16-18, 20-21, 25, and 29), but a process in which the federal government itself pays money directly to a successful litigant without going through the University's treasury.[2] A letter

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[2] "Reimburse" is defined in Webster's Third New International Dictionary (1976) as follows (at 1914): "**1** : to pay back (an equivalent for something taken, lost, or expended) to someone : REPAY <costs shall be ... *reimbursed* from such funds —*U.S. Code*> **2** : to make restoration or payment of an equivalent to (as a person) : INDEMNIFY < ~ government employees for travel expenses> **syn** see PAY". Under its definition of "pay" (at 1659), this dictionary compares the following words under "**syn**": compensate, remunerate, satisfy, reimburse, indemnify, recompense, repay, and pay: "... REIMBURSE applies to the return of an exact equivalent for an expenditure <county charges are admitted, the state *reimbursing* the county in the amount of 75¢ a day for each person; patients financially able to pay are charged $3 a day —*Amer. Guide Series: Mich.*> INDEMNIFY applies to compensations for loss, damage, or injury <the insurance company *indemnified* him for his losses> ..."

to Plaintiff Doe dated "Nov 23 1993" from the DOE's Acting Deputy Manager for its San Francisco Operations Office emphasizes the DOE's full support of this litigation:

> Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, *the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts.* Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

(Appendix I hereto at 3, emp. added). Neither the relevant clause of the Contract (App. at 36a-37a) nor the foregoing letter mentions "reimbursement" in any form.

Contrary to Petitioners' assertion (Pet. at 4), there are no relevant limitations on the foregoing provision for direct payment, since the cited "qualifications" apply only to subdivision (b), not to subdivision (c), *supra* ("[i]t is understood that the Government is obligated under this paragraph **(b)**, whether or not ..." [emp. added]), and there is no allegation of "bad faith or willful misconduct" in any event. Regarding the availability of DOE funds (Pet. at 4), Plaintiff Doe submits that a few years of his salary as a physicist is hardly enough to strain the budget of the DOE, which in any case has promised to "use its best effort to obtain such funds" (Article XVII, CL. 4 (d), App. at 37a).

Under "Factual Background", Petitioners cite several decisions of California Courts on the legal status of the University (Pet. at 3), but fail to mention *Regents of the*

University of California v. Aubry, 42 Cal.App.4th 579 (1966). There, the court held that the University is so different from other state agencies that, based on the same provisions of the California Constitution relied upon by Petitioners (Pet. at 3), it was exempt from the state's prevailing wage law. *Id.*, at 582. Quoting from another opinion, the court explained the strong independence of the University:

> "Article IX, section 9, grants the regents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the regents. This contrasts with the comprehensive power of regulation the Legislature possesses over other state agencies."
>
> "The courts have also recognized the broad powers conferred upon the regents as well as the university's general immunity from legislative regulation. '"The Regents have the general rule-making power in regard to the University ... and are ... fully empowered with respect to the organization and government of the University ... ." [Citations.] "[T]he power of the Regents to operate, control, and administer the University is virtually exclusive. [Citations.]"' [Citations.] [¶] ... '[T]he University is intended to operate as independently of the state as possible. (See Cal. Const., art. IX, § 9.)' [Citation.] ..."

Id., 42 Cal.App.4th at 586. As a result, the University was exempt from a state statute of general application because the "UC may further its core educational function by not paying prevailing wages." *Id.*, at 591.

Petitioners also contend that "[a]ll of [the University's] property is property of the state" (Pet. at 3), but ignore the express provision of Article IX, section 9(f) of the California Constitution, cited by the Ninth Circuit below (App. at 8a):

> The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct; ...

The legal independence of the University from the State of California explains why the latter, in 1978, actually had to convey property to the University it had obtained from the United States in 1873. *Moores v. Walsh*, 38 Cal.App.4th 1046, 1048 (1995). This independence is underscored by the Regents' own power to sell part of that property to private purchasers in 1993, *ibid.*, as well as the fact that the purchasers acquired no easement "because The Regents had no easement to convey." *Id.* at 1051. The State of California played no role whatsoever in the transactions between the University and these private parties.

3. *Proceedings Below*

Petitioners oversimplify the opinion of the Ninth Circuit below (Pet. at 7). While the majority did hold that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state" (App. at 7a), it concluded that the "University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity" (App. at 8a). The Ninth Circuit analyzed the third, fourth and fifth factors as follows:

> The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." *Id.* Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

App. at 8a. The Circuit found that only the second factor favored immunity, because "the regulation of public education is an important central government function" (App. at 8a). The Circuit concluded that (App. at 9a):

> The district court should have applied the five-factor analysis to this ***unique*** situation in which the Department [of Energy], and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. [emp. added],

and held (after citing cases) that (App. at 9a):

> [P]revious grants of immunity in contexts where the State of California is financially responsible for the University do ***not automatically*** translate into immunity in this ***unique*** situation. [emp. added]

Even the dissenting Circuit Judge conceded that "[i]n this case, these is a relatively clear indemnity agreement" (App. at 14a).

Petitioners strangely focus on "diversity jurisdiction", arguing that "[b]ecause the University was not considered part of the State, it was subject to the Court's diversity jurisdiction on Doe's contract claim" (Pet. at 7). Again, Petitioners ignore the fact that this case is primarily a federal civil rights action under 42 U.S.C. § 1983; Doe's contract cause of action, while invoking diversity jurisdiction, also falls within the supplemental jurisdiction provided by 28 U.S.C. § 1367(a). Petitioners' argument indicates that the Eleventh Amendment issue would disappear if diversity jurisdiction were not invoked.

Finally, Petitioners correctly state that suit was filed in June 1992, and that in May 1993 — almost a full year later — they moved to dismiss on Eleventh Amendment grounds (Pet. at 5-6). They fail to point out, however, that extensive discovery was conducted during this time, including an all-day deposition of Plaintiff Doe.

SUMMARY OF THE ARGUMENT

Fundamental to an understanding of the uniqueness of this case is the realization that the University is a mere facade for the DOE, which owns the Lawrence Livermore National Laboratory ("LLNL") and uses the good name of the University to attract talented scientists like Plaintiff Doe to work at the LLNL. Petitioners' argument would allow the University to shield the federal government and to deprive Respondents of the right to have their federal security clearance claim adjudicated by a federal court.

Also fundamental — and crucial — to this unique case is the provision of the Contract between the University and the DOE that requires the federal government to "*pay directly* and discharge completely all final judgments ... entered against the University [emp. added]" (App. at 36a, subdivision (c)). Despite Petitioners' assertions (Pet. at 9), this case involves neither reimbursement nor insurance, but direct payment of any judgment rendered against the University. Only one case cited by Petitioners, *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994) (Pet. at 9, 10, 19), may involve a Contract similar to the foregoing, but that opinion just mentions the Contract in passing (*id.*, at 1556) and utterly fails to mention let alone discuss its provision for direct payment by the DOE. Petitioners' reliance upon cases involving food stamps, aid to families with dependent children, unemployment insurance benefits, and supplemental state-law claims are simply not apposite.

Since the instant case does not fall within either view of the Eleventh Amendment set forth by Petitioners (Pet. at 9), it is not a proper vehicle for deciding any purported conflict that may exist among the circuits. The majority opinion of the Ninth Circuit herein (App. at 1a-11a) is fully consistent with all applicable precedents and should not be re-examined or disturbed.

REASONS FOR DENYING THE PETITION

Introduction

The Eleventh Amendment is an anomaly among jurisdictional principles. Unlike subject-matter jurisdiction, it can be waived. *ITSI TV Productions v. Agricultural Associations and the California Exposition & State Fair*, 3 F.3d 1289, 1291 (9th Cir. 1993), citing this Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 n. 3, (1991). Unlike personal jurisdiction, it can be waived only expressly, and not by a mere general appearance nor even by engaging in extensive litigation. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Adding to its complexity, Eleventh Amendment immunity may be raised at any time, even *sua sponte* by an appellate court after years of litigation, *Edelman*, 415 U.S. at 678 (see also *Mascheroni*, 28 F.3d at 1558-9), whereas subject-matter jurisdiction is ordinarily determined at the outset of litigation. See, e.g., *Topping v. Fry*, 147 F.2d 715, 718 (7th Cir. 1945). As a result, Eleventh Amendment issues are not for the intellectually lazy and often require detailed factual analyses for fair and accurate adjudication. See, e.g., *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 n. 2 (7th Cir. 1991) and *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 941, 943 (1st Cir. 1989); see also *Vaughn v. Regents of the Univ. of Cal.*, 504 F.Supp. 1349, 1353-54 (E.D.Cal. 1981) and *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (five-factor analysis, applied by the Ninth Circuit herein (App. at 6a-7a)). The simplification proposed by Petitioners — which ignores the unique facts of this case — would result in the deprivation of Respondents' right to have federal courts decide federal constitutional questions relating to federal security clearance procedures.

Argument

I. THE ELEVENTH AMENDMENT DOES NOT APPLY TO THIS CASE BECAUSE NO STATE FUNDS ARE INVOLVED, SINCE THE DOE WILL PAY DIRECTLY ANY AWARD OF DAMAGES.

The following facts are not susceptible to reasonable dispute:

> (1) Only damages payable by the DOE are sought against the University (prospective injunctive relief is sought only against official-capacity defendants under 42 U.S.C.§ 1983);
>
> (2) The DOE will pay directly any judgment rendered against the University; and,
>
> (3) Any money paid to Plaintiff Doe in this lawsuit will never be in the treasury of the State of California nor that of the University.

It is well settled that prospective injunctive relief against official-capacity state defendants is not barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21,27 (1991), following *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989); *Edelman*, 415 U.S. at 667; *Pennhurst*, 465 U.S. at 102-103; *Papasan v. Allain*, 478 U.S. 265, 276 (1986); and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146, 113 S.Ct. 684, 688-698 (1993). Petitioners are well-aware of the significance of these authorities (Pet. at 24 n. 21). Therefore, the only arguable basis for Eleventh Amendment applicability is the purported money damage question.

Regarding money damages, this Court has established that "a suit by private parties seeking to impose a liability

which ***must*** be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663 (emp. added), followed in *Quern v. Jordan*, 440 U.S. 332, 337 (1979). More recently, this Court emphasized the importance of this factor in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 404 (1994):

> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that ***must*** be paid out of a State's treasury. ... Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations [emp. added, citing cases from the first, third, fifth and seventh circuits].

In the instant case, the Ninth Circuit agreed. After setting forth its "five-factor analysis" (App. at 6a-7a):

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only in the name of the state, and [5] the corporate status of the entity.,

the Court concluded that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state" (App. at 7a). While most of Petitioners' authorities do not describe their analyses in terms of "factors", all which involve money damages appear to rely heavily if not solely upon the source of payment, and most follow *Edelman v. Jordan*, 415 U.S.

651 (1974), often citing page 663 or 665.[3] Therefore, the Eleventh Amendment applies only when a state's treasury is a source of funds to pay all of part of a money judgment.

With the foregoing in mind, we turn to Petitioners' assertion that "the circuits are split" on a particular Eleventh Amendment issue. Respondents, however, submit that the instant case is not relevant to any such split, so that granting certiorari here would not be appropriate.

II. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION HEREIN AND THOSE OF OTHER CIRCUITS.

A. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING ANY CONFLICTS THAT MAY EXIST AMONG THE CIRCUITS BECAUSE ITS SPECIFIC FACTS — DIRECT PAYMENT BY THE DOE — RENDER IT *SUI GENERIS* IN THE EXTREME.

Respondents emphasize that this case is unique beyond words. The majority opinion of the Ninth Circuit herein expressly recognized this uniqueness and correctly distinguished relevant precedents (App. at 9a, emp. added):

[3] See, e.g., *Bennett v. White*, 865 F.2d 1395, 1405, 1407-08 (3d Cir. 1989); *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), cert. den. 459 U.S. 1150 (1983); *Cannon v. Univ. of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983); *Doucette v. Ives*, 947 F.2d 21, 30 (1st Cir. 1991); *Esparza v. Valdez*, 862 F.2d 788, 794-95 (10th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 942-45 (1st Cir. 1989); *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir. 1991); *Lujan v. Regents of the University of Cal.*, 69 F.3d 1511, 1522-23 (10th Cir. 1995); and *Paschal v. Jackson*, 936 F.2d 940, 942-44 (7th Cir. 1991), cert. den 502 U.S. 1081 (1992).

> The district court should have applied the four-factor analysis to this ***unique*** situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934); *Thompson [v. City of Los Angeles]*, 885 F.2d [1439] at 1443 [(9th Cir. 1989)]; *B.V. Eng'g [v. U.C.L.A.]*, 858 F.2d [1394] at 1395 [(9th Cir. 1988)] (citing *Jackson [v. Hayakawa]*, 682 F.2d [1344] at 1350) [(9th Cir. 1982)]; *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, at 1351-54 (E.D. Cal. 1981). However, previous grants of immunity in contexts where the State of California is financially responsible for the University do ***not automatically*** translate into immunity in this ***unique*** situation. *Vaughn*, 504 F. Supp. at 1352-54 (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than ***blindly*** asserting immunity).

Note carefully that the controlling portion of the Contract between the DOE and the University submitted by Petitioners (App. at 36a-37a) does not mention "reimbursement" in any form. Therefore, this case, with its unique factual setting, is not a proper vehicle for resolving any conflicts that may exist among circuits in cases with distinctly different factual settings involving reimbursement, insurance, or the actual impact of judgments on state treasuries.

B. None of Petitioners' Authorities Conflicts with the Decision of the Ninth Circuit Herein.

Petitioners rely principally upon two classes of cases: those involving reimbursement by the federal government and those involving insurance. The first class of cases includes those involving federal-state benefit programs such as unemployment insurance ("UI") and aid to families with dependent children ("AFDC"). Since this Court has firmly established that partial federal funding of a benefit program does *not* impair Eleventh Amendment immunity, *Edelman*, 415 U.S. at 653, 673 and 678, no consideration need be given to the following cases cited by Petitioners: *Bennett v. White*, 865 F.2d 1395 (3d Cir. 1989) (AFDC); *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. den. 459 U.S. 1150 (1983) (UI); *Doucette v. Ives*, 947 F.2d 21 (1st Cir. 1991) (AFDC); *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988) (UI); and *Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), cert. den. 502 U.S. 1081 (1992) (UI). Any conflicts among these cases are not relevant, since, unlike the instant case, all involve at least some state funds. "[U]nemployment insurance was conceived as a joint effort among the states and the federal government." *Id.*, 936 F.2d at 942. In *Doucette*, 947 F. 2d at 29, the Eleventh Amendment issue was not even decided; the case was remanded for development "of underlying facts relating to the possibility and means of federal reimbursement". Note that Petitioners themselves characterize as reimbursement cases *Bennett* (Pet. at 14), *Brown* (Pet. at 13 — "recoup"), *Doucette* (Pet. at 16), *Esparza* (Pet. at 13 — "replenished"), and *Paschal* (Pet. at 9). In addition, *Esparza*, 862 F.2d at 795, held that "[i]mmunity should not depend on which aspect of a *state's tax base* it seeks to utilize" (emp. added). Since the federal government will pay directly any judgment rendered in the instant case, there can be no impact on California's tax base. Therefore, *Esparza* can hardly be said to conflict with the Ninth Circuit's decision herein.

Also included in Petitioners' first class of cases is the food stamp program, which is totally funded by the federal government except for half of a state's administrative costs. *Cotton v. Mansour*, 863 F.2d 1241, 1242 (6th Cir. 1988); 7 U.S.C. § 2025. "Here, the relief sought is solely retroactive and would impose direct administrate expenses on the State Treasury." *Cotton*, 863 F.2d at 1246. The statement in *Cronen v. Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), that the source of funds is irrelevant, amounts to erroneous dicta, since all states fund administrative expenses. *Foggs v. Block*, 722 F.2d 933, 941 n. 6 (1st Cir. 1983) characterized these expenses as "de minimis", but was reversed on other grounds *sub nom. Atkins v. Parker*, 472 U.S. 115 (1985). *Robinson v. Block*, 869 F.2d 202, 214 n. 11 (3d Cir. 1989) did hold that federal funding defeated Eleventh Amendment immunity, but relied solely upon *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir. 1989), which specifically referred to "reimburse[ment] by the United States." Again, note that Petitioners themselves characterize as reimbursement cases *Cotton* (Pet. at 16 n. 10), *Cronen* (Pet. at 18 n. 16) *Foggs* (Pet. at 15) and *Bennett* (Pet. at 14). Therefore, Petitioners' food stamp authorities do not present any conflict with the Ninth Circuit's decision in the instant case.

Turning to Petitioners' second class of cases — those involving insurance — *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) disposes of this point:

> The source of any damages ... would be state funds even if paid by an insurance carrier. Such carriers would pay only because of premiums ***paid by the state***. The Eleventh Amendment immunity should not be made to turn on whether or not the state is a self-insurer. [emp. added]

Accord, *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 945 (1st Cir. 1989). Using a multi-factor

analysis similar to that used by the Ninth Circuit below to determine the Eleventh Amendment issue, *id.*, at 942, the Court found, *inter alia*, that 72.9 per cent of the state entity's funds came from the state's general funds and that the state would pay any judgment. *Id.*, at 943 (Puerto Rico was the "state"; immunity was upheld). Clearly, Petitioners' insurance cases present no relevant conflict here.

Finally, Petitioners cite four civil rights cases (three involving employment) and one wrongful death case. *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982) (Pet. at 15) may be disposed of quickly. After citing *Edelman*, 415 U.S. at 677, the Court found that the relevant funds were "state and federal funds intermingled." *Fernandez*, 681 F.2d at 59. As a result, the back pay award (for educational administrators) was barred by the Eleventh Amendment because "[t]he Commonwealth [of Puerto Rico] here cannot avoid using state funds to pay the award". *Id.*, at 60.[4]

Cannon v. Univ. of Health Sciences, 710 F.2d 351, 353 (7th Cir. 1983), characterized by Petitioners as a reimbursement case (Pet. at 12 n. 6), involved claims of age and sex discrimination by women under 30 seeking admission to medical schools. Paraphrasing *Edelman*, the Court upheld Eleventh Amendment immunity because "it is a 'virtual certainty [that any damage award will] be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action.' 415 U.S. at 668" (brackets by the Court). *Cannon*, 710 F.2d at 357. *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904 (7th Cir. 1991), also characterized by Petitioners as a reimbursement case (Pet. at 12 n. 6), was a suit for wrongful

[4] The principal issue In *Fernandez* was whether the statute of limitations barred plaintiffs' claims of political discrimination under 42 U.S.C. § 1983. *Id.*, at 48-55. The Eleventh Amendment issue was secondary.

discharge under 42 U.S.C. § 1983 where the Seventh Circuit simply followed its earlier decision in *Cannon*. *Kroll*, 934 F.2d at 908. Significantly, the Court pointed out that "[e]ach state university exists in a unique governmental context", so that "[t]his determination [of immunity] requires a fairly fact-intensive analysis." *Id.*, at 908 n. 2. The governmental context of the University herein, where the federal government will "pay directly" any judgment rendered in this lawsuit, could not be more unique.

In their struggle to demonstrate a relevant conflict among the circuits, Petitioners rely most strongly upon *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994) (Pet. at 9, 10, 19). Despite the Court's passing mention of "a contract with the United States Department of Energy", *id.*, at 1556, that action involved a federal Title VII claim of national origin discrimination in employment, coupled with a few supplemental state tort and contract claims. *Id.*, at 1556, 1557. However, the federal claim was barred by the statute of limitations. *Id.*, at 1563 ("untimely"). As a result, the Eleventh Amendment issue there, unlike that in the instant case with its federal claim under 42 U.S.C. § 1983, involved only state-law claims. *Id.*, at 1557.

Clearly, federal jurisdiction over those state-law claims was tenuous at best, since 28 U.S.C. § 1367(c) provides that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if — ... (3) the district court has dismissed all claims over which is has original jurisdiction.

Neither diversity nor any other possible basis for federal jurisdiction is mentioned in *Mascheroni*.

Nonetheless, the Court raised the Eleventh Amendment issue *sua sponte*, *id.*, at 1556-57, as it had done previously in *Esparza v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988), and went on to find immunity without the slightest reference to the Contract between the University and the DOE for the management of the Los Alamos National Laboratory. *Mascheroni*, 28 F.3d at 1559-60, conceded by Petitioners (Pet. at 10 n. 4 and 19).[5] No provision of that particular Contract appears in the opinion (nor in the record herein), and Petitioners baldly assert that it was "a like contract with the DOE" (Pet. at 19). Respondents submit that this Court should not base its decision upon speculatory assumptions about the contents of the Los Alamos Contract.[6] In addition, even *Mascheroni* recognizes the relevance of "the degree of state funding the entity receives". *Id.*, at 1559. A subsequent Tenth Circuit decision involving reimbursement of federal welfare benefits followed *Mascheroni* and upheld Eleventh Amendment immunity "because the funds to satisfy the award 'must inevitably come from the general revenues' of the state. *Edelman* ..." *Johns v. Stewart,* 57 F.3d 1544, 1553 (10th Cir. 1995), at 1552 & 1554 citing *Mascheroni*. Therefore, Petitioners have failed to demonstrate a conflict between *Mascheroni* and the Ninth Circuit's decision in the instant case.

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[5] Respondents have been unable to find any mention in either *Esparza* or *Mascheroni* of briefing by the parties on the Eleventh Amendment issue. None of the parties in either case raised this issue. *Esparza*, 862 F.2d at 793; *Mascheroni*, 28 F.3d at 1558. Without such adversarial briefing, these appellate opinions may have little value.

[6] Even if one assumes, *arguendo*, that the Los Alamos Contract contained an indemnification provision of some kind, one cannot fairly assume that it also contained a broad promise by the federal government to "pay directly" *any* judgment rendered in that lawsuit, whether based on a nuclear accident, employment discrimination, or otherwise.

While Petitioners mention *Lujan v. Regents of the University of Cal.*, 69 F.3d 1511 (10th Cir. 1995) only in a footnote and characterize it as another reimbursement case (Pet. at 14 n. 8), an examination of the federal indemnification statute involved there is worthwhile because it underscores the fundamental difference between reimbursing and paying directly.

The plaintiff in *Lujan* relied upon a provision of the Price-Anderson Act, 42 U.S.C. § 2210(d), for federal indemnification of the University for any damages she might be awarded for the death of her daughter from alleged nuclear radiation from the Los Alamos National Laboratory. *Id.*, at 1522 and 1513. Nowhere in these subdivisions, which are limited to nuclear incidents, is there a provision to "pay directly" any judgment, claim or cost of litigation. Unlike the Contract between the DOE and the University herein, § 2210(h) imposes severe qualifications and conditions on the indemnification provided by the government, including delays in any money that may — or may not — be paid to the person or entity indemnified. That is, a Commission or the Secretary of Energy "*may* approve the payment of any claim under the agreement of indemnification" (emp. added). The government may settle a claim, but "[s]uch settlement shall *not* include *expenses* in connection with the claim incurred by the person indemnified" (emp. added).

To even qualify for indemnification, a DOE contractor may be required to purchase insurance at its own expense. Subdivision (d)(2) provides that "the Secretary may require the contractor to provide and maintain financial protection", and limits indemnification to claims "above the amount of financial protection required". Clearly, there is no resemblance between the possibility of indemnification in *Lujan* and the direct payment provided here.

Moreover, the *Lujan* Court held that the plaintiff's federal claims were barred by the statute of limitations, 69 F.3d at 1513, leaving only her state-law claims, which were not covered by the Price-Anderson Act. *Id.*, at 1523. Since there was no obligation for the federal government to indemnify the plaintiff, the Court did "not reach the question of whether the Eleventh Amendment applies to a claim that would *ultimately* be paid from federal — not state — funds." *Ibid.* (emp. added). The Court concluded (at 1523) that:

> As to those [state-law] claims, any recovery would have to come from "public funds in the state treasury," making the claims against the state and thus barred by the Eleventh Amendment. [citing *Edelman* at 663]

The Court's reference to "a claim that would *ultimately* be paid" supports Petitioners' characterization of *Lujan* as another reimbursement case (Pet. at 14 n. 8). Clearly, both *Lujan* and *Mascheroni* — involving state-law claims and possible reimbursement — have no relationship to the instant case, with its federal claims and direct payment by an agency of the federal government.

III. THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS, HAS NO IMPACT UPON STATE SOVEREIGN IMMUNITY, AND IMPOSES NO PRACTICAL BURDEN WHERE A DEFENDANT SUCH AS THE UNIVERSITY GETS A FREE RIDE FROM THE FEDERAL GOVERNMENT.

Contrary to Petitioners' assertions, the narrow issue presented here does not "arise[] frequently" and has not "divided the circuits" (Pet. at 21). Not one opinion cited by Petitioners — not even *Mascheroni* — mentions direct payment of judgments by the federal government nor discusses the significance thereof. Nonetheless, Petitioners speak of "protecting the States from having to appear and defend suits in the federal courts" (Pet. at 21), and cite a recent decision of this Court on "the coercive process of judicial tribunals" (Pet. at 22, citing *Seminole Tribe of Florida v. Florida*, ____ U.S. ____ (slip op. at 12-13) (No. 94-12, March 27, 1996). They also assert "[t]he importance of States' dignitary interests in being immune from federal court jurisdiction", citing *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994) (Pet. at 23).

As before, Petitioners continue to ignore the unique provision in the Contract between the University and the DOE for direct payment by the federal government of "all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees" (subdivision (c), App. at 36a). They also ignore the corresponding statement in the letter of November 23, 1993 from DOE management to Plaintiff Doe, that "the Department [of Energy] will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts" (Appendix I hereto at 3). Moreover, the University has "the power to sue and be sued" (App. at 8a, quoting from the California Constitution). In reality, Petitioners'

"coercive process" is nothing more than an all-expenses-paid experience for attorneys representing the University at the expense of *federal* — not state — taxpayers, where the federal government also picks up the tab and "pay[s] directly" any judgment rendered against the University.[7]

Petitioners' reliance upon *Hess* is puzzling (Pet. at 23-24), since this Court expressly held that "the impetus for the Eleventh Amendment [is] the prevention of federal court judgments that ***must*** be paid out of a State's treasury. *Hess*, ___ U.S. at ___, 115 S.Ct. at 404 (emp. added). This Court repeated that principle again, observing (at 406) that:

> Both Circuits [Second and Third], in accord with the prevailing view, see *supra*, at 404-405, identify "the 'state treasury' criterion — on whether any judgment ***must*** be satisfied out of the state treasury — as the most important consideration" in resolving Eleventh Amendment immunity issues. [emp. added]

Petitioners' quotation from *Pennhurst*, 465 U.S. at 101 n. 11 regarding a judgment that "would expend itself on the public treasury or ... restrain the Government from acting" (Pet. at 24) is also puzzling, since Respondents seek prospective injunctive relief against the University's managers of the

[7] Petitioners' suggestion for "summary action" herein based on a statement in *Seminole* (slip op. at 12) that "the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment" is erroneous and misleading (Pet. at 22 n. 19). This Court merely distinguished between "prospective injunctive relief rather than monetary relief", noting that "[i]t would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State simply because no money judgment is sought". *Ibid*. There was no discussion of direct payment of a judgment by the federal government. Rather, the issue in *Seminole* was the power of Congress to abrogate a State's immunity under the Eleventh Amendment (slip op. at 1).

LLNL based on procedural violations of federal security clearance regulations.[8] The impact of an injunction would be limited to official-capacity state defendants, such as the Director of the LLNL; there would be no impact on any state entity as such. *Cerrato v. San Francisco Community College District*, 26 F.3d 968, 973 (9th Cir. 1994) (enjoining prospective hiring of plaintiff under 42 U.S.C. § 1983 is not barred by Eleventh Amendment). Even reinstatement to a previously-held position constitutes prospective relief. *Lassiter v. Alabama A & M University*, 3 F.3d 1482, 1485 (11th Cir. 1993). See also *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983) (reclassification and placement on the fire department's roster for future employment is "a classic form of prospective remediation"). *Hess* emphasized the importance of protecting a state's treasury, and this Court has held that suits under 42 U.S.C. § 1983 for injunctive relief against official-capacity state defendants are not barred by the Eleventh Amendment. *Will*, 491 U.S. at 71 n. 10, followed in *Hafer*, 502 U.S. at 27; accord, *Puerto Rico Aqueduct*, 506 U.S. at 146, 113 S.Ct. at 688-89, citing *Ex parte Young*, 209 U.S. 123 (1908). Clearly, the Ninth Circuit's opinion herein is fully consistent with applicable precedents of this Court.

Moreover, Petitioners' confusion of sovereign immunity with Eleventh Amendment immunity does not serve their cause (Pet. at 21-29). According to Petitioners' own authority, "[i]f the Eleventh Amendment only applied where the state was immune from suit, it would be superfluous." *Lujan*, 69 F.3d at 1522 (Pet. at 14 n. 8).

[8] Petitioners erroneously conclude that Plaintiff Doe's § 1983 claims are barred by *Edelman* and ignore federal diversity jurisdiction over his contract claims (Pet. at 24-25, nn. 21 & 22). Yet, on the very next page, they admit diversity jurisdiction ("[d]iversity cases such as this case...") but ignore the predominance herein of the federal civil rights claim under 42 U.S.C. § 1983 (Pet. at 26 n. 23).

Indeed, the University itself has "the power to sue and be sued", at least in state courts (Cal. Const., art. 9, § 9(f), cited by the Ninth Circuit below, App. at 8a). Since the federal government will "pay directly" any judgment rendered against the University — whether rendered in state or federal court — Petitioners have negated the foundation of their own argument by the following statement (Pet. at 22):

> Once a State has consented to suit in its own courts, suit in federal court should not lead to any more financial impact on the State than suit in State courts, ...

Since this suit against the University in federal court will have no financial impact whatsoever on the University, the State of California, nor any of its components, Petitioners' contentions regarding sovereign immunity — and even the Eleventh Amendment itself — must fail. For the sake of completeness, however, we turn to Petitioners' argument on the "practical implications of the ruling below" (Pet. at 26-29).

Regarding practical implications, Petitioners' merely rehash their previous arguments and continue to harp on irrelevant factors such as reimbursement (and eventual recoupment) (Pet. at 27-29). They urge this Court to simplify Eleventh Amendment jurisprudence at the expense of citizens who desire to have their federal security clearance claims decided by federal courts. If Petitioners had their way, the mere appearance of the name of a state in a defendant's name would trigger immunity. Implicitly rejecting such an approach by applying the established five-factor analysis, the Ninth Circuit denied immunity to the California Exposition & State Fair. *ITSI TV*, 3 F.3d at 1292-93. Respondents submit that Eleventh Amendment determinations should be based on facts and not merely labels.

Petitioners complain of "fact-intensive mini-trials" (Pet. at 27), but fail to cite even one case in which that occurred. The "fact-specific inquiry" mentioned in *Doucette*, 947 F.2d at 29, is hardly a trial, and Petitioners admit that *Doucette* is a "reimbursement" case (Pet. at 28). They object to "a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state'", citing *Paschal*, 936 F.2d at 944 (Pet. at 28). But *Paschal* is admittedly another reimbursement case (Pet. at 12), and the Court itself observed that "it is not altogether clear that total reimbursement from the federal government to the states is a sure thing. Title 42 § 502(a) ..." *Id.*, at 944. The instant case, wherein the federal government will "pay directly" any judgment against the University, stands in sharp contrast to Petitioners' authorities.

Petitioners also complain of "burdensome discovery" and argue for "a threshold immunity from suit" (Pet. at 27 & 28), but fail to explain why they engaged in discovery for almost one year before moving for dismissal under the Eleventh Amendment (Pet. at 5-6 for dates). They also fail to state that the Contract between the DOE and the University is a public document, available under the Freedom of Information Act and the equivalent California statute, so that their argument regarding discovery is inapposite. Finally, Petitioners contend that "an award of damages against the University could affect future University-DOE contracts" (Pet. at 28 n. 24), but ignore the fact that the DOE would "pay directly" a state court judgment as well as a federal court judgment, and that both judgments necessarily would be equal. Indeed, Petitioners have contradicted their previous argument in which they criticized as "unfounded speculation" a Court's conclusion that higher insurance premiums would result from federal litigation, *San Juan Dupont Plaza*, 888 F.2d at 945, correctly pointing out that the state entity there could "sue and be sued" in state courts (Pet. at 18). Given that Plaintiff Doe can obtain identical money judgments in a state or federal

court, either of which judgments will be paid directly by the DOE, one wonders why Petitioners object so strenuously to federal jurisdiction, especially when this case may turn on a procedural question of federal security clearance law.

In short, the ruling below has no practical implications beyond the specific and unique facts of this case, because the federal government will "pay directly" — not reimburse — any judgment rendered against the University. Respondents submit that the simplistic and intellectually lazy approach to Eleventh Amendment adjudication urged by Petitioners is contrary to this Court's established jurisprudence.

CONCLUSION

The University's Petition for a Writ of Certiorari should be denied. Since this case is *sui generis* in the extreme, granting certiorari would not resolve any of the conflicts asserted by Petitioners. Contrary to Petitioners' assertions, this case does not involve reimbursement, recoupment or insurance, but the direct payment of any judgment by the DOE, so that there is no potential impact upon either the treasury of the University or that of the State of California. Petitioners should not be permitted to bootstrap their misstatement of the "Question Presented" to create conflicts among the circuits nor an "important question of federal law" within the meaning of Supreme Court Rule 10(c). The federal civil rights issues presented by this case, under 42 U.S.C. § 1983, should be decided by federal courts. The contract claim as such is secondary, and its resolution may turn on a question of federal security clearance procedures.

The detailed factual analysis employed by the Ninth Circuit below was necessary, proper, and consistent with this Court's precedents; the automatic, blind approach suggested by Petitioners flies in the face of this Court's jurisprudence and would give excessive and unnecessary breadth to Eleventh Amendment immunity.

Dated: May 13, 1996

Respectfully submitted,

Richard Gayer

RICHARD GAYER, ESQ.,
Attorney of Record for
Plaintiffs-Respondents
JOHN DOE, Ph.D., and all
others similarly situated.

Appendix I

Department of Energy

San Francisco Operations Office
1301 Clay Street
Oakland, California 94612-5208

Nov 23 1993

Dr. B[] G[]
[street address]
New York, New York [zipcode]

Dear Dr. G[]:

This is in response to your telephone conversation with me earlier this month concerning the Lawrence Livermore National Laboratory's (LLNL's) withdrawal of its offer of employment to you in June 1991. Based upon a review of the correspondence in this matter, there appear to be two major issues in this controversy.

The first of these issues concerns the reasons given by various Laboratory employees at different times for the withdrawal of the offer of employment. In retrospect, it appears that the Laboratory was not entirely candid with you in initially defending its decisions as based on security concerns and concluding that you were not a viable candidate for a security clearance. In his letter of September 25, 1992, the Manager of the San Francisco Field Office concluded that the Laboratory process for documenting its decision and conveying that information to you was unsatisfactory. As you know, that letter went on to clearly state the Department's policy that employment decisions cannot be made on the basis of security clearance determinations which are solely within the province of DOE, while recognizing that the Laboratory was solely responsible

for determining that an applicant is qualified and suitable to perform the duties of that position.

The SF Manager also requested that the Laboratory review your case and determine if there were additional actions LLNL should take. As you know the Laboratory subsequently reaffirmed its decision not to hire you, apparently on grounds other than its conclusion as to whether you were a viable candidate for a security clearance. Based upon your conversation with me and other SF personnel, you view the different statements by various Laboratory employees at different times as inconsistent and intellectually dishonest. You also believe that the SF review of this matter, in your words, was "fraudulent."

The second major issue in your case is whether your accepted the Laboratory's offer before it was withdrawn, thereby creating a valid contract. I am informed that this is a purely technical legal issue.

Our records reflect that you filed a complaint with the Office of the Inspector General for the Department in October 1991, and that Congressman Bill Green wrote to the Department on your behalf in the same month. You subsequently initiated litigation against the Department, the University of California and LLNL Director John Nuckolls based on the Laboratory's decision not to hire you. Depositions of the SF Manager and LLNL employees involved in this matter were taken. Thereafter, the Complaint was amended to eliminate the Department as a defendant. The U.S. District Court in San Francisco later granted the University's Motion to Dismiss UC, and John Nuckolls, in his official capacity, as defendants based on the 11th Amendment of the United States Constitution. I understand that your action against Director Nuckolls, in his personal capacity, continues in federal court, and that you have filed an appeal with the 9th Circuit U.S. Court of Appeals.

The substance of your complaint, and action you request, is that the Department should do the right thing and direct the Laboratory to hire you. This would also permit the Department to determine your eligibility for a security clearance. I believe that the Department has done everything it can legally do under the circumstances of your case, and I cannot take the action you have requested.

The Lawrence Livermore National Laboratory (LLNL) is a Government-owned facility which is primarily funded by the Department of Energy. The University of California manages and operates LLNL for the Department, and the rights and obligations of the University and the Department are defined by Contract Number W-7405-ENG-48. Under the contract, the Department does not have the right to substitute its judgment as to your qualifications and suitability for employment for that of the Laboratory and direct that you be hired by the Laboratory. (This is generally the case under all Government contracts.)

Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts. Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

Moreover, allegations of fraud, waste and abuse are within the exclusive jurisdiction of the Department's Office of Inspector General. In this respect. I understand that the OIG continues to be interested in your case.

Finally, I am also aware that, since the withdrawal of LLNL's offer of employment in June 1991, you have sought to resolve your grievance informally at the highest levels of the Department, the executive and legislative branches of the federal government, the University of California and the state government. I can also understand your frustration that two years of conscientious and persistent effort on your part has not been able to resolve the issues. I also know that our position in this matter is unacceptable to you. However, I believe that the Department has done everything it can legally do under the contract with the University of California, and that we must await the outcome of your litigation.

Sincerely,

[Signature]

Martin J. Domagala
Acting Deputy Manager

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1694

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

v.

JOHN DOE, Ph.D., et al.,
Respondents.

PROOF OF SERVICE BY MAIL

I, Richard Gayer, am the attorney for Plaintiffs-Respondents JOHN DOE, Ph.D., and all others similarly situated in this case.

On May ___, 1996, I mailed three copies of the attached Respondents' Brief in Opposition to the attorneys for the defendants-petitioners at the following address:

Charles Miller, Esq.
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

I certify under penalty of perjury that the foregoing is true and correct.

Dated: May ___, 1996

RICHARD GAYER, ESQ.,
Attorney of Record for
Respondents JOHN DOE,
Ph.D., et al.

(5)

No. 95 - 1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent Doe does not deny that there is split in the circuits on the issue presented in the University's Petition. As fully explained in the Petition (at 9-21), there is a pervasive split in the circuits: Some circuits follow the rule urged by the dissent below -- that Eleventh Amendment immunity turns on whether a State entity would be legally liable for the judgment entered in the case. Other circuits follow the approach adopted by the majority -- that immunity turns on a prediction of the likely financial impact that a judgment in the case may have on State resources.

Respondent instead devotes most of his opposition to arguing that the decision below does not bear upon the circuit split because, under the indemnity provision of the University-DOE contract, the federal government is required (subject to certain exceptions) to pay directly any money judgment entered against the University. Far from distinguishing away the circuit split, respondent's argument only demonstrates that this case presents the issue dividing the circuits in a particularly stark form.

Doe does not and cannot deny that the University will be legally obligated to satisfy any judgment entered in this case: The coercive process of the district court will run against the University -- and *only* against the University -- not the Department of Energy or any other federal agency. That undeniable fact squarely implicates the circuit split identified in the Petition because those circuits that base Eleventh Amendment immunity on legal liability (*i.e.*, the Fifth, Seventh and Tenth Circuits) would reach the result urged by the dissent below.

On the other hand, the fact stressed by Respondent -- that the indemnity provision in the University-DOE contract is, as Judge Canby noted, "relatively clear" (App. at 14a) -- presents the best case for the other side of the circuit split. For those circuits that base Eleventh Amendment immunity on the likely financial impact of each particular judgment (*i.e.*, the Third, Fourth and probably First Circuits), the relative certainty of the indemnity provision makes this a straightforward case for applying the theory of those circuits to deny the University Eleventh Amendment immunity

because it will *probably* not bear the ultimate cost of the judgment. (There is no *guarantee* that the University will not bear the cost of the judgment, but that is a general problem with the approach followed by those circuits.)

None of Doe's other arguments can obscure that this case provides a clean and straightforward set of facts to resolve the circuit split identified in the Petition.

A. This Case Presents The Circuit Split Identified In The Petition.

As Justice White noted in dissent from the denial of certiorari in *Paschal* v. *Didrickson*, 502 U.S. 1081, 1081 (1992), the split in the circuits encompasses the issue whether the Eleventh Amendment bars a suit even though "recovery is sought from funds . . . which come from the Federal Government." The precise mechanics of how the funds would "come from" the government is not relevant to the circuit split.[1/] Nevertheless, Respondent Doe hinges the bulk of his opposition to certiorari on the observation that the indemnity provision in the University-DOE contract requires the federal government (subject to certain exceptions) to pay directly final judgments entered against the

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[1/] Respondent argues that "the University is a mere facade for the DOE." Opp. at 10. That is nothing more than Doe's own biased characterization of the joint State-federal operations at LLNL. But in any event, it is hard to understand why Doe believes that such a slanted characterization has any relevance. First, Doe is suing only the University and its officers; if he believed his real dispute was with the DOE, he should not have dismissed his claims against all federal defendants in the District Court. Second, it is quite clear that a breach of contract action against the DOE would have to be brought exclusively in the Court of Claims. *See* 28 U.S.C. § 1491. Doe can escape that exclusive jurisdiction only because he is *not* suing the DOE. Finally, Doe's biased characterization does nothing to take this case out of the circuit split, because the same slanted label could be applied to any joint State-federal effort where the federal government shoulders the cost of the program.

University.[2/] From that correct observation, Doe argues (1) that the federal government will with certainty pay any judgment entered in this case and (2) that therefore the circuit split is not implicated. Both parts of this argument are wrong.

First, Respondent plainly errs in contending that the University's indemnity rights guarantee that the federal government will pay any judgment entered in the case. Even the DOE letter on which Respondent relies expressly states the DOE's position that it will bear the cost of any monetary judgment against the University "absent clear and convincing evidence of bad faith and willful misconduct of the Laboratory Director." Opp. App. at I - 3. The University could be expected to deny any allegations of bad faith and willful misconduct were DOE to resist payment on such grounds. But the important point is that there is always the risk of litigation over that point, and nothing in this case between the University and Doe can preclude the government from asserting a defense under the indemnity provision.

In addition to the bad faith exception, the contract also contains a number of other exceptions (*see* Pet. at 4), including a general exception dependent on "the availability of funds appropriated from time to time by Congress." App. at 37a. While Respondent Doe claims that "a few years of his salary as a physicist is hardly enough to strain the budget of the DOE," Opp. at 5, his opinion that the exception is unlikely to be invoked provides no certainty to the University.

[2/] Part of Doe's argument focuses on semantics, specifically on the different shades of meaning between the words "indemnify" and "reimburse." *See* Opp. at 4 n.2. Even in terms of pure semantics, his point is weak: The very dictionary he quotes lists "reimburse" and "indemnify" as being within a class of synonyms for "pay." *Id.* But in any event, Doe's semantic point is irrelevant because the circuit split identified in the Petition does not turn on the mechanics of how the government would bear the cost of any judgment.

But even assuming that Doe is correct that the DOE is highly likely to pay any judgment entered against the University in this case, that only leads to the conclusion that this case presents the circuit split identified in the Petition in a particularly clean form.

The courts splitting from the Ninth Circuit do not base their decisions on an assessment of the probability that the State will bear the cost of the judgment, or on the mechanics of whether the federal government, if it is to bear the cost, will write the check to the plaintiff or to the State. Rather, the splitting circuits afford Eleventh Amendment immunity if the judgment -- the coercive process of the court -- will run against the State entity.

Thus, in *Cannon* v. *University of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983), the court held that the universities in that case were entitled to Eleventh Amendment immunity because any judgment in the case would be "chargeable to university assets." *See also id.* ("If Cannon's suit would result in a damage award *payable by the universities*, it is barred by the Eleventh Amendment.") (emphasis added). Accordingly, the court rejected the argument that the universities were not entitled to Eleventh Amendment immunity because of "the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* The precise mechanics of how an insurance company or the federal government might meet any damage award, as well as the exact probability that any damage award would be so met, were not relevant to the court's analysis.[2/] Here, as in *Cannon*,

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[2/] Respondent incorrectly argues that the *Cannon* court afforded Eleventh Amendment immunity "because 'it is "a virtual certainty [that any damage award will] be paid from state funds, and not from the pockets of the individual state officials who were defendants in the action."'" Opp. at 18 (quoting *Cannon*, 710 F.2d at 357 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 658 (1971))). The court quoted *Edelman* in rejecting the plaintiff's alternative argument that she could seek damages against the universities by naming individual defendants. Furthermore, the court interpreted the passage from *Edelman* as applying to the case because (continued...)

any judgment will clearly be "chargeable to university assets" as any district court monetary judgment will run only against the University. Accordingly, *Cannon* conflicts with the result below.

Kroll v. *Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904 (7th Cir. 1991), took the analysis of *Cannon* further. There the plaintiff, like the Respondent here, argued that the Eleventh Amendment did not apply because his judgment would not have to satisfied out of public funds. *Kroll* rejected that argument, stating that the flaw in the argument "is that it assumes that the eleventh amendment does not apply unless and until a private party seeks a money judgment payable from the state treasury." *Id.* at 908 (emphasis added). *Kroll* clarified that, even if a plaintiff is *not* seeking a money judgment payable from the state resources, the Eleventh Amendment demands dismissal of any suit against a State entity "in the absence of one of the two previously noted exceptions" (*id.*) to immunity: (1) express waiver by the State or (2) abrogation of immunity by Congress under the Fourteenth Amendment. *See id.* at 907 (listing exceptions).

Respondent attempts (Opp. at 19) to distinguish *Kroll* by referring to a footnote which states that "the determination [of whether a university is a State agency] requires a fairly fact-intensive analysis." *Id.* at 908 n.2. But, under the approach of the *Kroll* court, that analysis was conducted by looking to the university *as an institution* to determine whether, *as a whole*, it is part of the State. In this respect, the *Kroll* court followed precisely the analysis urged by the dissent below. It relied on its prior precedent for the holding that the University of Illinois *as an institution* was a State entity for purposes of the Eleventh Amendment. *Id.* at 908. Because the plaintiff had no argument that the ties between the State and the university had changed, *id.*

[2/](...continued)
"[r]ecovery is *sought* from the institutions, not the individuals." 710 F.2d at 357 (emphasis added). Here, as in *Cannon*, monetary recovery is being sought against the University, not against any individual defendant.

at 908 n.3, the court adhered to its prior precedent and refused to inquire into the financial impact of the particular judgment sought in that case. This is the position of Judge Canby, who argued that the immunity of University should be controlled by "established precedent" so long as the structural relationship between the State and the University has not changed.[4/] App. at 14a, 12a.

The other cases identified in the Petition follow an approach identical to that followed by the Seventh Circuit in *Cannon* and *Kroll*: The cases hold that the Eleventh Amendment immunity is triggered where the suit is against a State entity, regardless of how any judgment might be satisfied in that particular case. Thus, for example, in *Cronen* v. *Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), the court rejected the plaintiff's argument that a suit against a State entity could go forward where the award sought in the case "would be paid entirely by the federal government." The court squarely held that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.* Respondent's assertion that this statement is "erroneous dicta" (Opp. at 17) is unsupported and incorrect.[5/]

[4/] Respondent recites facts that, he claims, suggest a "legal independence of the University from the State of California." Opp. at 7. These facts actually show only that the University is independent from the other branches of State government. Thus, the State legislature has less power over the University than "'over other state agencies.'" Opp. at 6 (citation omitted). Also, the fact the University can hold property in its own name (Opp. at 6-7) is entirely consistent with that property being considered part of the State's property (Pet. at 3). But in any event, these facts are irrelevant as Respondent does not challenge that, in the absence of indemnification, the Ninth Circuit and all other courts agree that the University is part of the State. In fact, he concedes that the indemnification arrangement was "[c]rucial to the Ninth Circuit's decision." Opp. at 3.

[5/] Respondent suggests that the Fifth Circuit should have been decided on a narrower ground that the relief sought would still have a financial impact on the State "since all states fund administrative expenses [in the (continued...)

Similarly, *Esparza* v. *Valdez*, 862 F.2d 788, 795 (10th Cir. 1988), reasoned "even if we could find little or *no* fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis." Respondent attempts to distinguish *Esparza* by quoting an earlier passage in the opinion stating that "[i]mmunity should not depend on which aspect of the state's tax base it seeks to utilize." *Id.* (quoted in Opp. at 16). But that quote represents only part of the court's reasoning. The court went further in next paragraph and held that the Eleventh Amendment applies even if there "no fiscal impact on the state." *Id.* Under the *Esparza* court's test, the Eleventh Amendment applies where "money damages are *awarded* against the state," *id.* (emphasis added), without inquiry into how such an award will actually be satisfied.

Finally, Respondent cannot distinguish *Mascheroni* v. *Board of Regents of the Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994). As in *Kroll*, the *Mascheroni* court first determined that the University as an institution must be considered part of the State, and then held that, because it was part of the State, the University could not be sued in federal court unless one of only two exceptions applies: "express waiver of Eleventh Amendment immunity, or unequivocal Congressional abrogation of the States' Eleventh Amendment immunity." *Id.* at 1559-60 (citations omitted); *compare Kroll*, 934 F.2d at 907, 908 (same). Respondent correctly notes that the *Mascheroni* court did not investigate the contents of the Los Alamos contract and that it raised the Eleventh Amendment issue *sua sponte*. These observations only reinforce our arguments: The details of the

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[5/](...continued)
food stamp program]." Opp. at 17. That, however, was *not* the court's holding. Moreover, the fact that the *Cronen* court did not investigate the precise mechanics of how the federal government shoulders the cost of the food stamp program only proves our point: In the circuits disagreeing with the Ninth Circuit, those mechanics are not relevant.

contract were not investigated because they were not *relevant* to the court's test for affording immunity. Furthermore, because courts sometimes have to adjudicate the jurisdictional issue of immunity *sua sponte*, the test for immunity must be relatively straightforward, without an unwieldy "financial impact" inquiry.

Even the cases on the other side of the circuit split do not turn on the mechanics of how the federal government would bear the cost of the relief entered in the case -- the major point advanced by Respondent. Thus, *Bennett* v. *White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989), held that the Eleventh Amendment did not apply where the "relief would be at the expense of the federal government." *Robinson* v. *Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989), held that relief was available against a State program to the extent the program is "federally funded." *Foggs* v. *Block*, 722 F.2d 933, 941 n.6 (1st Cir. 1983), *rev'd on other grounds sub. nom.*, *Akins* v. *Parker*, 472 U.S. 115 (1985), held that no Eleventh Amendment bar existed where the cost of the State program "is borne by the federal government." And finally, *Brown* v. *Porcher*, 660 F.2d 1001, 1007 (4th Cir.), *cert. denied*, 459 U.S. 1150 (1981), took the most extreme position in holding that the Eleventh Amendment did not bar relief so long as the State's "general revenues" are protected from liability.

Whatever else might be said about these cases, it is clear that they turn on whether the federal government bears the cost of judgment directly or indirectly. The fact that Respondent stresses about this case -- the relatively straightforward and direct indemnity provision -- only means that this case presents an analytically clean version of the split.

B. Respondent Cannot Reconcile The Decision Below With This Court's Decision In *Seminole Tribe*.

Respondent relegates to a footnote his discussion of this Court's recent decision in *Seminole Tribe of Florida* v. *Florida*, 116 S.Ct. 1114 (1996), but the case cannot be so easily dismissed.

Seminole Tribe reaffirmed this Court's long-held position that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Id.* at 1124. Yet, in ruling that the University loses its immunity because the cost of any monetary award sought by the plaintiff is likely to be borne by the United States, the Ninth Circuit has clearly made "the relief sought by the plaintiff" relevant to the "question whether the suit is barred by the Eleventh Amendment."

Seminole Tribe also confirmed the proposition that the Eleventh Amendment bars both monetary damages *and* injunctive relief. *Id.* Here, the plaintiff is seeking both a monetary award of damages *and* an order of reinstatement. Even if the United States would pay any damage award entered against the University, an order of reinstatement will operate directly against the University. Under the Ninth Circuit decision, however, the University loses its protection against injunctive relief merely because it may not bear the brunt of the monetary award.

Nor can Respondent escape this problem by noting that, under § 1983, he "seek[s] prospective relief against [University officials] based on procedural violations of federal security clearance regulations."[5/] Opp. at 24-25. To get *that* relief, Doe must prevail on the § 1983 claim, which would require (at a minimum) showing that (1) the University violated security regulations, (2) violations of federal security regulations are cognizable under § 1983 (a difficult task, given that § 1983 would

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[5/] Respondent emphasizes his § 1983 claim and states that he "strongly disagree[s]" that this case can be characterized as a contract action. Opp. at 2. Doe's emphasis on the § 1983 claim is inexplicable. The § 1983 claim does nothing to change the case for certiorari here, as it is well-settled by numerous decisions that the Eleventh Amendment applies equally to federal question and diversity jurisdiction. *See Seminole Tribe*, 116 S.Ct. at 1127. Nonetheless, we note in passing that the only claim that Doe pursued on appeal against the University was his contract claim; his § 1983 claim was pursued on appeal only against Petitioner Nuckolls. *See* App. at 15a, 17a, 19a-20a.)

apply only if, *inter alia*, a federal law "creates obligations . . . intended to benefit the putative plaintiff," *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 108 (1989)); and (3) that an order of reinstatement is prospective relief. But under the Ninth Circuit's ruling, which stripped the University of its Eleventh Amendment immunity, Respondent can seek injunctive relief against the University even if he prevails *only* on his contract claim, notwithstanding that such relief would ordinarily be foreclosed by this Court's holding in *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984).

In sum, the decision below, which hinges the University's Eleventh Amendment immunity on an evaluation of the financial impact of the judgment, implicates a deep circuit split and cannot be reconciled with this Court's decisions.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 95-1694

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OCTOBER TERM, 1995

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v.

JOHN DOE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES

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16 pp

IN THE

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OCTOBER TERM, 1995

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to S. Ct. Rule 37.2(b), *amici* American Council on Education ("ACE"), American Association of State Colleges and Universities ("AASCU"), and National Association of State Universities and Land-Grant Colleges ("NASULGC") seek leave to file the attached brief in support of petitioners. *Amici* requested the consent of the parties to this filing and received the consent of petitioners, but not that of respondents.

Amici are major national organizations in the field of higher education and are interested in this case because of its importance to state colleges and universities. *Amicus* ACE, founded in 1918, represents

all sectors of American higher education. Its members are approximately 1700 institutions, including most of the nation's state colleges and universities. ACE's mission is to strengthen America's institutions of higher education by supporting their goals of teaching, research, and public service. *Amicus* AASCU, founded in 1961, represents more than 370 state colleges and universities across the United States. *Amicus* NASULGC, founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states.

Amici seek to participate in this case because they and their members are concerned about the adverse consequences to the nation's institutions of public higher education of the rule announced by the court below. *Amici* are uniquely qualified to articulate why Eleventh Amendment immunity is vital to state colleges and universities and why the approach used by the court below to determine the availability of immunity is harmful to these institutions of higher education. In a similar representative capacity, these *amici* have joined in briefs *amici curiae* in this Court previously, the most recent such brief being filed in *United States v. Winstar Corp.*, No. 95-865.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1694

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education. Its members are approximately 1700 institutions, including most of the nation's state colleges and universities. ACE's mission is to strengthen America's institutions of higher education by supporting their goals of teaching, research, and public service.

Amicus American Association of State Colleges and Universities ("AASCU"), founded in 1961, represents more than 370 state colleges and universities across the United States. *Amicus* National Association

of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. Its members include 177 public research universities located in all 50 states. *Amici* ACE, AASCU, and NASULGC are interested in this case because of the direct impact of the rule announced by the court below on the operation, management, and funding of state colleges and universities.

One of the most successful components of American higher education is the extensive system of state-established and state-supported colleges and universities. These institutions include some of the leading centers of teaching and research in the world. There are over 600 public four-year institutions of higher education in the United States and another 1,000 public two-year institutions. Collectively, state colleges and universities are engaged in educating approximately 11 million undergraduate, graduate-level, and professional-school students. [1]/

The decision below is of great concern to *amici* and their members because it is inconsistent with the efforts of state colleges and universities, particularly those with a significant research commitment, to operate their academic and research programs as an efficient integrated whole, not a collection of unrelated parts. University-connected research facilities strengthen faculty teaching and thereby advance student learning. The decision below artificially differentiates among activities of the University of California, recognizing some academic activities as "state functions" for which the university is entitled to Eleventh Amendment immunity while classifying other academic activities as

[1]/ *Digest of Education Statistics 1995*, Tables Nos. 223, 172, National Center for Education Statistics, U.S. Department of Education.

"non-state functions" for which Eleventh Amendment immunity is not available.

SUMMARY OF ARGUMENT

This case presents critical issues of constitutional law on which the circuits are sharply split. The Ninth Circuit decision is flawed both in terms of Eleventh Amendment doctrine and because of the unwarranted exposure to which it subjects state colleges and universities. When a federal court has determined that a university is an "arm of the state," the court should dismiss any action that, if successful, would result in a judgment against the university. To displace this analysis by imposing a multi-factor test, including an inquiry into whether third party indemnification or other non-state funds may be available to satisfy a judgment, compromises states' constitutional immunity from suit in federal court.

This Court has held that the jurisdictional purposes of the Eleventh Amendment are not limited to protecting state treasuries. Rather, the Eleventh Amendment is central to federalism and protects states from the indignity of suit in the federal forum at the instance of private parties. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996). This constitutional immunity from suit, upon which public higher education institutions depend, is vitiated if a state must prove in federal court that there are no third parties and no non-state funds to pay the federal court judgment.

The strained budgets of state colleges and universities derive from hard-gained state legislative appropriations, tuition and fees, private contributions, and public and private grants. The decision below triggers a constitutionally inappropriate inquiry into a state university's funding sources and the allocation of those funds. Plaintiffs will seek to prove that the institution can be sued in federal court because of the existence or even the theoretical availability of non-state

funds to pay a federal judgment. Such an inquiry effectively abrogates a state's immunity from suit and undermines a public university's ability to conduct an integrated program of research and teaching.

ARGUMENT

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE A SPLIT IN THE CIRCUITS ON THE PROPER TEST FOR WHETHER A STATE UNIVERSITY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The frequency of litigation against the nation's hundreds of state colleges and universities underscores the need for uniform constitutional doctrine on when and whether these institutions are subject to suit in federal court. This case presents an opportunity to resolve the conflict between the approach applied in the Ninth and Third Circuits and that applied in the Seventh and Tenth Circuits in determining whether a state university is entitled to Eleventh Amendment immunity.

A. The approach in the Ninth and Third Circuits.

In this case, the Ninth Circuit applied a five factor test to determine whether the University of California is immune from this suit in federal court: "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." *Doe v. Lawrence Livermore National Laboratory*, App. at 6a-7a. Of the five factors, the court said that "[s]tate liability for money judgment is the single most important ...." *Id.* at 7a.

The *Doe* majority acknowledged that "the University has been granted Eleventh Amendment immunity in a number of cases," *id.* at 9a (citing cases), but did not follow those authorities, reasoning that "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation." *Id.* at 9a. The "unique situation" which the court found sufficient to deny Eleventh Amendment immunity was the prospect of third-party indemnification for a judgment against the University of California, an institution otherwise an "arm of the state." *Id.* at 9a.

The Third Circuit has used a similar approach, albeit with a nine-factor inquiry, to analyze whether Rutgers, The State University of New Jersey, was entitled to Eleventh Amendment immunity. *See Kovats v. Rutgers, The State University*, 822 F.2d 1303, 1307 (3d Cir. 1987). No single factor was deemed conclusive, but "perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury...." *Id.* at 1307 (quoting *Urbano v. Board of Managers of the New Jersey State Prison*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970)).

The salient common feature of the approach in the Ninth and Third Circuits is that it involves factual inquiry into the source of funds to pay a judgment in each particular suit. *See Doe*, App. at 9a (university not entitled to Eleventh Amendment immunity where federal government would indemnify State); *Kovats*, 822 F.2d at 1308 ("relief should not be viewed as coming from the state where an entity has the ability to pay a judgment from private funds not subject to state control").

B. The approach in the Seventh and Tenth Circuits.

In contrast to the burdensome inquiry to which state universities are subjected in the Third and Ninth Circuits, a more straightforward approach has been

followed in recent Seventh and Tenth Circuits cases. *See Kroll v. Board of Trustees of the University of Illinois*, 934 F.2d 904 (7th Cir.), *cert. denied*, 502 U.S. 941 (1991); *Mascheroni v. Board of Regents of University of California*, 28 F.3d 1554 (10th Cir. 1994).

These decisions treat Eleventh Amendment immunity as a question of law, not fact; that is, when a state university is sued in federal court, the court examines the legal question of whether, as a matter of state law, the university is an agency or arm of the state. If so, the university is entitled to immunity as a matter of law without regard to the facts of a particular case, including whether the university may have a right to seek reimbursement or indemnification. *See Kroll*, 934 F.2d at 907 ("a state agency *is* the state for purposes of the eleventh amendment") (emphasis in original); *Mascheroni*, 28 F.3d at 1559 (examine state law to determine whether the university is an arm of the state).

As explained below, *amici* strongly support the approach followed by the Seventh and Tenth Circuits, believing that approach consistent with both Eleventh Amendment doctrine and sound university administration. A substantially different approach is followed by these circuits than was applied by the court below, or than would be applied by the Third Circuit. Review is warranted to resolve this conflict. [2]/

[2]/Lower courts have noted the inconsistency in judicial approach to this question of Eleventh Amendment immunity for state colleges and universities. *See Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301-02 (6th Cir. 1984), (noting that the "great majority" of cases have found public colleges and universities entitled to Eleventh Amendment immunity, but there are cases to the contrary) (citing cases), *cert. denied*, 469 U.S. 1113 (1985); *Kovats*, 822 F.2d at 1312 (same). The large number of cases cited in *Hall* and *Kovats* confirms both the frequency with which state colleges and universities are defendants in federal litigation and the lack of uniformity on a basic jurisdictional principle.

II. THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT CONFLICTS WITH THIS COURT'S ELEVENTH AMENDMENT DECISIONS AND BECAUSE OF ITS ADVERSE IMPACT ON STATE UNIVERSITIES.

A. The Ninth Circuit approach is inconsistent with Eleventh Amendment immunity.

The court below reasoned that because of the possibility of federal indemnification, the University of California was not entitled to dismissal of plaintiffs' lawsuit. *See* App. at 9a. That rationale is inconsistent with this Court's holdings that the Eleventh Amendment is a jurisdictional limitation on the federal courts which grants the states "immunity from suit in federal court," *see, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984), not simply immunity from financial adverse impact.

As this Court recently noted, its Eleventh Amendment cases "have often made it clear that the relief sought by a plaintiff is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 116 S. Ct. at 1124. Because the relief sought is irrelevant to the question of Eleventh Amendment immunity, inquiries about how the state will satisfy a judgment, *i.e.*, what funds will it use and whether they will all originate from the state treasury, are equally irrelevant. Eleventh Amendment immunity does not depend on the nature of the judgment sought, *Seminole Tribe*; *Cory v. White*, 457 U.S. 85, 90 (1982), and thus should not depend on how that judgment will be satisfied.

The consequence of the lower court's decision is a factual inquiry in every case involving a state college, university or other state agency to determine the financial impact on the state treasury of a federal court judgment. To be held immune, state agencies would be

required to prove that the particular activity at issue is largely, if not entirely, state funded, and that substitute private or federal funds are unavailable to satisfy any judgment. That type of inquiry destroys a state's rightful expectation of immunity from suit in federal court.

The states' constitutional expectation of "immunity from suit" should include certainty that immunity will be consistently and promptly afforded. A complex, multi-factor test to determine the fundamental jurisdictional power of the federal court over an agency of the state invites litigation, produces inconsistent results, and thus ultimately denies a state the assurance of immunity to which it is constitutionally entitled. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995) ("[T]he proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal."); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 376 (1959) ("[S]ound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence.").

Rather than determining immunity on a preliminary motion to dismiss, the Ninth Circuit approach invites protracted litigation. Plaintiffs will conduct wide-ranging discovery on, for example, university funding and fiscal matters. The district court will then hold a mini-trial on the fiscal impact on the state (*i.e.*, "whether a money judgment would be satisfied out of state funds," *Doe*, App. at 6a) before the court considers dismissing under the Eleventh Amendment. A state university subjected to this type of federal court scrutiny enjoys no "immunity from suit."

Further, even if non-state funds are available to satisfy a judgment, that does not mean that being involved in federal litigation has no adverse impact on

the state treasury. The state would, in virtually all instances, still bear the substantial costs of federal court litigation, including the costs of litigating the issue of immunity in advance of the merits. Imposition of these costs is an indignity beyond the more fundamental federalism concern of "making one sovereign appear against its will in the courts of the other." *Pennhurst*, 465 U.S. at 100 (citation omitted). [3]/

B. The Ninth Circuit approach is uniquely inappropriate when applied to state colleges and universities.

To maintain a state university, particularly one of the scope and excellence of the University of California, appropriated state funds must be supplemented by student fees, private contributions, and private and federal grant funds. Under the Ninth Circuit approach, this mixed funding alone permits plaintiffs to argue that any federal judgment will not "be satisfied out of state funds." Because money is fungible and part of every state university's budget is non-state funds, universities will be hard pressed to prove that judgments cannot be paid unless only state funds are used.

This fixation on the state treasury is inconsistent with both Eleventh Amendment doctrine and sound educational policy. State university administrators should be encouraged to enhance their institutions by supplementing taxpayer funds with funds from other sources. Moreover, research facilities like the Lawrence Livermore Laboratory are integral to the academic and intellectual life of a university without regard to their source of funding. Research is not incidental to the

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[3]/The Ninth Circuit's approach of requiring a mini-trial before immunity is determined is similarly inconsistent with this Court's qualified immunity doctrine. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). There, as with the Eleventh Amendment immunity, the immunity is "an *immunity from suit* rather than a mere defense to liability...." *Mitchell*, 472 U.S. at 526 (emphasis in original).

teaching of students; it is an essential element of teaching. To fulfill their academic mission, state colleges and universities must and invariably do obtain non-state financial support for research facilities, faculty salaries, and other purposes.

The lower court reasoned that a state university loses its Eleventh Amendment immunity in connection with a research program (and by extension other activities) to the extent that the university obtains non-state funding for these activities. This approach impedes public universities from performing their mission by denying them Eleventh Amendment protection. The doctrinally more sound approach is to determine a public university's status by reference to state law without regard to the funding of particular activities. A broader and more complex inquiry undermines a public university's educational mission and is inconsistent with the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 17, 1996
CERTIORARI GRANTED JUNE 17, 1996

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16792

Doe v. University of California, et al.

Date	Description
9/29/93	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
1/10/94	Filed original and 15 copies Appellant John Doe opening brief (Informal: n) 23 pages and five excerpts of record in 1 volume; served on 1/8/94
2/4/94	Filed original and 15 copies appellee University of Calif.'s 30 pages brief, 1 Exc. vols; served on 2/4/94
2/15/94	Filed original and 15 copies John Doe reply brief (Informal: n) 6 pages; served on 2/15/94
11/7/94	Received Richard Gayer for Appellant John Doe letter dated 11/4/94 re: he is fearful that the long delay of calendaring will hurt his client's employment chances. (CALENDAR)
2/15/95	Filed John Doe additional citations, served on 2/14/95 (PANEL)
3/15/95	ARGUED AND SUBMITTED TO Herbert Y. CHOY, William C. CANBY & Thomas G. NELSON; CJJ.

9/11/95	FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Herbert Y. CHOY, author; William C. CANBY, dissenting; Thomas G. NELSON.) FILED AND ENTERED JUDGMENT.
9/25/95	Filed original and 40 copies Appellee University of Calif. petition for rehearing with suggestion for rehearing en banc 14 pages, served on 9/25/95 (PANEL & ALL ACTIVE JUDGES)
10/4/95	Filed order (Herbert Y. CHOY, William C. CANBY, Thomas G. NELSON): Aplts shall file a response to P/R en banc & request to take judicial notice of "Campus financial schedules 1991-1992", which is attached to the P/R.
10/25/95	Filed Appellant John Doe's response to petition for enbanc rehearing [2868359-1] served on 10/25/95. (PANEL & ALL ACTIVE JUDGES)
1/19/96	Filed order (Herbert Y. CHOY, William C. CANBY, Thomas G. NELSON): There having been no objection made by aplts to the request made by aples that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby granted. A majority of the panel has voted to deny aple's P/R and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. The P/R is denied and the suggestion for rehearing en banc is rejected.

1/26/96	Filed University of Calif. motion to stay the mandate pending petition for writ of certiorari, served on 1/26/96 (CHOY by fax)
1/31/96	Filed order (Herbert Y. CHOY): Appellee's motion to stay the mandate pending petition to the U.S. Supreme Court for a writ of certiorari is granted.
6/21/96	Rec'd letter from the Supreme Court dated 6/17/96 re: order file granting American Council on Education, et al. leave to file brief amicus curiae. The petition for writ of certiorari is granted.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

No. 92-CV-2284

Doe v. Lawrence Livermore, et al.

Date	No.	Description
6/18/92	1	COMPLAINT (Summons(es) issued)
9/14/92	5	ANSWER by defendant Lawrence Livermore, defendant John Nuckolls, defendant University of Calif., defendant David Gardner to complaint [1-1]
9/25/92	7	MOTION by plaintiff John Doe for leave to file first amended complaint with Notice set for 10/29/92 @ 2:15 PM
10/20/92	11	STIPULATION and ORDER by Judge Stanley A.Weigel : for leave to file a first amended complaint, extending time to answer first amended complaint to 11/18/92
10/22/92	13	FIRST AMENDED COMPLAINT [1-1] by plaintiff John Doe
10/27/92	15	MOTION by federal defendants for protective order staying all discovering pending submission and resolution of Federal Defendants' dispositive motion with Notice set for 12/10/92
11/25/92	22	STIPULATION of dismissal of federal defendants

11/25/92	--	Docket Modification (Utility Event) dismissing party Richard Claytor, party James O. Watkins, party US Dept of Energy [15-1] with prejudice
12/9/92	23	MOTION by defendant to dismiss before Judge Stanley A. Weigel with Notice set for 1/14/93 @ 2:15
12/9/92	24	MEMORANDUM by defendant in support of motion to dismiss before Judge Stanley A. Weigel
12/24/92	25	MEMORANDUM by plaintiff John Doe in opposition to motion to dismiss before Judge Stanley A. Weigel [23-1]
12/24/92	26	DECLARATION by Richard Gayer on behalf of plaintiff re opposition memorandum [25-1]
1/8/93	28	REPLY by defendant to response to motion to dismiss before Judge Stanley A. Weigel [23-1]
2/5/93	29	MEMORANDUM, OPINION AND ORDER: by Judge Stanley A. Weigel All plaintiff's causes of action against defendant Gardner are dismissed; plaintiff's breach of contract cause of action against defendant Nuckolls is dismissed; plaintiff's section 1983 cause of action against defendant Nuckolls in his official capacity is dismissed; plaintiff's section 1983 cause of action against defendants UC, Lab, Groseclos, Perret, and Perko is dismissed.

2/17/93	30	ANSWER by defendant University of CA, defendant John Nuckolls, defendant Lawrence Livermore to complaint [13-1]
2/22/93	31	MOTION by plaintiff for reconsider on motion to dismiss, for leave to file second amended complaint with Notice set for 3/25/93 at 2:15 pm
2/22/93	32	MEMORANDUM by plaintiff in support of motion for reconsider on motion to dismiss [31-1], of motion for leave to file second amended complaint [31-2]
3/11/93	33	OPPOSITION by defendants to motion for reconsider on motion to dismiss [31-1], motion for leave to file second amended complaint [31-2]
3/17/93	34	REPLY by plaintiff John Doe to response to motion for reconsider on motion to dismiss [31-1], motion for leave to file second amended complaint [31-2]
3/25/93	36	MEMORANDUM, OPINION, AND ORDER: by Judge Stanley A. Weigel denying motion for reconsider on motion to dismiss [31-1], granting motion for leave to file second amended complaint [31-2]
4/7/93	37	SECOND AMENDED COMPLAINT [13-1] by plaintiff John Doe terminating defendant David Gardner
5/10/93	40	MOTION before Judge Stanley A. Weigel by defendant to dismiss second amended complaint with Notice set for 6/24/93 @ 2:15

5/10/93	41	MEMORANDUM by defendant in support of motion to dismiss second amended complaint [40-1]
6/4/93	42	OPPOSITION by plaintiff to motion to dismiss second amended complaint [40-1]
6/17/93	43	REPLY by University of CA, John Nuckolls, Lawrence Livermore to response to motion to dismiss second amended complaint [40-1]
6/24/93	45	MEMORANDUM, OPINION, AND ORDER: by Judge Stanley A. Weigel granting motion to dismiss some claims in the second amended complaint [40-1]
7/7/93	46	ANSWER by defendant John Nuckolls to complaint [37-1]
8/3/93	50	NOTICE OF MOTION AND MOTION by plaintiff John Doe to stay, to certification to appeal under Rule 54b with Notice set for 9/2/93 at 2:15 pm
8/3/93	51	DECLARATION by Richard Gayer on behalf of plaintiff John Doe re motion to stay [50-1], re motion to certification to appeal under Rule 54b [50-2]
8/3/93	52	BRIEF FILED by plaintiff John Doe regarding motion to stay [50-1], regarding motion to certification to appeal under Rule 54b [50-2]
8/13/93	53	OPPOSITION by defendant to motion to stay [50-1], motion to certification to appeal under Rule 54b [50-2]

8/24/93	54	REPLY by plaintiff John Doe re motion to stay [50-1], re motion to certification to appeal under Rule 54b [50-2]
9/2/93	56	MEMORANDUM and ORDER by Judge Stanley A. Weigel: plaintiff's claim for breach of contract is dismissed; this action stayed pending decision by Ninth Circuit; plaintiff Doe is to report to the Court the status of the appeal, commencing in 90 days and every 30 days thereafter. dismissing case
9/13/93	57	JUDGMENT: by Judge Stanley A. Weigel, in accordance with the 9/2/93 memorandum and order, it is adjudged that plaintiff's claims for breach of contract are dismissed.
9/22/93	58	NOTICE OF APPEAL by plaintiff John Doe from Dist. Court decision judgment [57-1] fee pd, receipt #31100
9/27/93	59	DECLARATION by Richard Gayer on behalf of plaintiff for filing of the contract between the University of California and the U.S. Dept of Energy (contract attached)
10/27/93	62	JUDGMENT: by Judge Stanley A. Weigel dismissing case with prejudice

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR JOHN DOE, PHD., and all others similarly situated

Plaintiffs-Appellants,

vs

LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,

Defendants

and

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Appellee

C 92-2284 SAW

Filed September 11, 1995

JUDGES Before: Herbert Y. C. Choy, William C. Canby, Jr. and Thomas G. Nelson, Circuit Judges. Opinion by Judge Choy; Dissent by Judge Canby.

CHOY, Circuit Judge:

Appellant, Dr. John Doe, Ph.D. ("Doe"), on behalf of himself and all others similarly situated, appeals the district court's dismissal of his breach of contract claim against the Regents of the University of California ("University") and his § 1983 claim against John Nuckolls ("Nuckolls"), director of the Lawrence Livermore National Laboratory ("Laboratory") which is owned by the United States Department of Energy ("Department") and is operated by the University.

Doe is a mathematical physicist who signed an employment contract with the Laboratory. Doe contends that the Laboratory wrongfully refused to perform the contract of employment by peremptorily determining that Doe could not obtain a security clearance from the Department. The district court dismissed Doe's breach of contract claim against the Laboratory and the University because it held that the Laboratory and the University, as arms of the state, were immune from suit in federal court under the Eleventh Amendment. Doe appeals the district court's decision to grant Eleventh Amendment immunity to the University, as manager of the Laboratory.

Doe also appeals the district court's dismissal of his *42 U.S.C. § 1983* claim against Nuckolls, in his official capacity, and seeks reconsideration of his application for employment at the Laboratory without reference to security clearance matters. The district court dismissed the § 1983 claim because it determined that Nuckolls was not a "person" under § 1983 and thus was not liable for Doe's claim which sought relief solely for a violation alleged to have occurred in the past.

Having jurisdiction under *28 U.S.C. § 1291*, we reverse the district court's dismissal of Doe's breach of contract claim. We hold that the Eleventh Amendment does not immunize the University from suit in federal court because the University is not an "arm of the state" in this specific instance. We also reverse the dismissal of Doe's § 1983 claim against Nuckolls, in his official capacity, because Nuckolls is a "person" under § 1983 and is liable to suit for retrospective relief. We need not address the

issue of whether reconsideration of Doe's employment constitutes prospective injunctive relief but remand to the district court for further proceedings in accordance with our holding.

I

Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. The Laboratory is a facility operated by the University under contract with the Department. Although the University controls all employment matters at the Laboratory, the Department exclusively handles security clearances for Laboratory employees.

Doe allegedly accepted the Laboratory's written offer of employment as a physicist in mid-June, 1991. The employment offer included a salary of $6,100 per month and required Doe to obtain a "Q" security clearance from the Department in a reasonable period of time after he became an employee of the Laboratory. Doe alleges that shortly after he accepted the employment offer, the Laboratory attempted to withdraw the offer, claiming that Doe could not obtain the required security clearance from the Department.

The contract between the United States of America ("Government") and the University for the management and operation of the Laboratory specifies that the Department, rather than the University, will pay the costs of any judgment rendered against the University in performing the contract, including all costs involved in litigation. Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48 ("Contract").

On June 18, 1992, Doe filed his initial complaint against the University, its president, David Gardner ("Gardner"), the

Laboratory, and its director, Nuckolls.[1] The complaint contained a claim for breach of employment contract against the Laboratory, the University, Gardner, and Nuckolls. In addition, the complaint contained a § 1983 claim against the Laboratory, the University, and Nuckolls and Gardner, in their official capacities, alleging deprivation of due process of law because unqualified personnel at the Laboratory peremptorily determined eligibility for a "Q" security clearance in violation of federal security clearance regulations. Finally, the complaint contained a claim for failure to enforce security regulations. On October 22, 1992, Doe amended his complaint to add allegations suing Nuckolls and three additional employees of the University, all in their individual capacities, for violation of § 1983.

On December 9, 1992, the defendants moved to dismiss Doe's § 1983 claim on the ground that the University and the Laboratory, as arms of the State, and Gardner and Nuckolls, in their official capacities, are not "persons" within the meaning of § 1983. In addition, the defendants sought to dismiss the three newly-added University employees and Nuckolls, in his individual capacity, on the ground that the statute of limitation period had run. Finally, Gardner and Nuckolls moved to dismiss Doe's breach of contract claim on the ground that neither was alleged to be party to the employment contract.

On February 5, 1993, the district court dismissed all claims against Gardner, the breach of contract claim against Nuckolls, and the § 1983 claim against the University, the Laboratory, the three University employees, and Nuckolls, in his official capacity. In its order, however, the district court noted that a plaintiff may assert a § 1983 claim against a state official, acting in her official capacity, if the plaintiff seeks prospective injunctive relief. Doe's

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[1] The Department, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs) were also listed as defendants but were later dismissed with prejudice by stipulation on November 25, 1992.

breach of contract claim against the University and the Laboratory, and his § 1983 claim against Nuckolls, in his individual capacity, survived.

On April 7, 1993, Doe filed a second amended complaint which contained two claims. The first claim, against the Laboratory and the University, alleged breach of employment contract. Doe also brought a § 1983 claim, seeking declaratory and prospective injunctive relief, against the University, the Laboratory, and Nuckolls, in his official and individual capacities. Finally, the second amended complaint added class action allegations.

On May 10, 1993, the defendants moved to dismiss Doe's breach of contract claim against the University and the Laboratory on the ground that they were immune from suit under the Eleventh Amendment. In addition, the defendants moved to dismiss Doe's renewed § 1983 claim against the University and the Laboratory on the ground that neither is a "person" within the meaning of § 1983. Finally, the defendants moved to dismiss Doe's § 1983 claim against Nuckolls, in his official capacity, insofar as the claim was based upon alleged past violations of law because Nuckolls is not a "person" for such retrospective § 1983 relief.

On June 24, 1993, the district court granted the motion to dismiss all aspects relevant to this appeal. The district court dismissed the breach of contract claim against the University and the Laboratory on Eleventh Amendment ground. The district court also dismissed the § 1983 claim against the University and the Laboratory, noting that the same claim already had been dismissed in its February 5, 1993 order. Finding that the relief Doe sought - reconsideration of his employment application - did not constitute prospective injunctive relief, the district court dismissed Doe's § 1983 claim against Nuckolls in his official capacity. The district court entered a final judgment on September 16, 1993, and Doe timely filed a notice of appeal on September 22, 1993.

II

Doe contends that the district court erred when it dismissed his breach of employment contract claim against the University, as manager of the Laboratory, on the ground that the Eleventh Amendment of the United States Constitution grants the University immunity from suit in federal court. A determination of a state's immunity from suit under the Eleventh Amendment is a question of law which is reviewed *de novo*. *BV Eng'g v. University of Cal., L.A., 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has extended the reach of the Eleventh Amendment to bar federal courts from presiding over any suit in which a state or "arm of the state" is a defendant. *State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199, 73 L. Ed. 262, 49 S. Ct. 104 (1929)*. However, "not all state-created or state-managed entities are immune from suit in federal court. . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*.

We apply a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court. *See Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988)* (considering the source of funding for California state colleges and

universities to determine whether they are protected by Eleventh Amendment immunity), cert. denied, *490 U.S. 1081 (1989)*. The five factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993).

State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state. *Durning, 950 F.2d at 1424*. We must evaluate "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." Id. We conclude that this factor weighs against granting the University Eleventh Amendment immunity from suit in federal court. The Contract makes clear that the Department, and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract. "When a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity under the arm of the state doctrine . . . ." *Id. at 1425-26*.

The second factor, whether the University performs central government functions, weighs in favor of finding that the University is an arm of the state and granting it Eleventh Amendment immunity. In analyzing this factor, we look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory. *See id. at*

1426. We look to the way California law treats the University in order to assess whether the University performs central government functions. *Id. at 1423*. The California State Attorney General has stated that the University is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive." *30 Ops. Cal. Att'y Gen. 162, 166 (1957)*. California case law also clearly recognizes the University as a branch of the state government. See *Ishimatsu v. Regents of Univ. of Cal., 266 Cal. App. 2d 854, 72 Cal. Rptr. 756, 762-63 (Cal. Ct. App. 1968); Regents of Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978)*. Finally, the California Education Code defines the University's mission, accords the University with exclusive jurisdiction over education in certain professions, and allocates to it the primary responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1995). The regulation of public education is an important central government function, thus the second factor weighs in favor of granting immunity to the University.

The University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity. The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with the legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." Id. Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

The district court erred when it relied upon *Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir. 1989)* (holding that the

University was immune from a civil rights suit in federal court where the State of California would have been ultimately responsible for payment of the judgment) and *Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)* (stating in dictum, that the University was an instrumentality of the state), to rule that the University is always immune from suit in federal court.

The district court should have applied the five-factor analysis to this unique situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257, 79 L. Ed. 343, 55 S. Ct. 197 (1934); Thompson, 885 F.2d at 1443; B.V. Eng'g, 858 F.2d at 1395* (citing *Jackson, 682 F.2d at 1350); Vaughn v. Regents of the Univ. of Cal., 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981)*. However, previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation. *Vaughn, 504 F. Supp. at 1352-54* (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than blindly asserting immunity).

The University is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions. See, e.g., *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 940 (Fed. Cir. 1993)* (recognizing that Congress has abrogated the University's immunity from suit in federal court for violation of patent law), cert. denied, *114 S. Ct. 1126 (1994); In re Holoholo, 512 F. Supp. 889, 901-02 (D. Haw. 1981)* (finding that the University waived its Eleventh Amendment immunity by signing a government contract that contemplated possible suits against it in federal court and by entering into a federally regulated area),

superseded by statute, not in relevant part, as stated in, *Bator v. Judiciary, Adult Probation Div., 1992 U.S. Dist. LEXIS 22214* (D. Haw. May 20, 1992). The source of funding in each situation, in addition to the four other factors for determining Eleventh Amendment immunity, must be examined closely to ascertain that the University is indeed functioning as an arm of the state.

The University argues that the district court in *Holoholo, 512 F. Supp. at 895,* held that the University is an arm of the state despite an indemnification provision similar to the one in the Contract in this case. The district court in that case held that "since the [University] depends upon appropriations by the California Legislature, any damages awarded against the [University] would, absent insurance or other indemnification, come from the state treasury." *Id. at 895* (emphasis added). In making that statement, the district court had not considered the specific indemnification provision in the contract between the University and the United States and later acknowledged that "the exact nature and extent of the indemnification are not clear[,]" but that the indemnification provision "could render the Eleventh Amendment inapplicable to these state defendants [including the University]." *Id. at 899 n.14.*

After applying the five-factor analysis, we find that the University, acting in a managerial capacity for the Laboratory, has not satisfied the burden of proving that it is entitled to Eleventh Amendment immunity. Because we hold that the University, in this specific instance, is not entitled to Eleventh Amendment immunity from suit in federal court, we need not address whether the University has waived or Congress has abrogated the University's immunity. See *BV Eng'g, 858 F.2d at 1396.*

III

Doe next contends that the district court erred when it dismissed his § 1983 claim against Nuckolls, in his official capacity. We have determined that the University is not protected by the Eleventh Amendment from suit in federal court because the

University, in this particular instance, is not functioning as an arm of the state. Because we hold that the University is not an arm of the state in this instance, it is a "person" under § 1983. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989);* see also *Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652, 654* (N.J.), cert. denied, *488 U.S. 826 (1988).* Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a "person" who is fully liable under § 1983. See *Thompson, 885 F.2d at 1442-43* ("only those governmental entities which are 'persons' within the meaning of § 1983 can be held liable under § 1983.").

Because we hold that the University and Nuckolls, acting in his official capacity, are fully liable to suit under § 1983, we need not address the question of whether reconsideration of Doe's employment by the Laboratory constitutes prospective injunctive relief. Doe may sue both the University and Nuckolls in federal court regardless of whether the relief he seeks constitutes prospective or retrospective relief. We remand to the district court for further proceedings in accordance with our ruling. We deny Doe's request for attorney's fees because the defendants brought forth a legitimate argument on the basis of Eleventh Amendment immunity.

REVERSED and REMANDED.

CANBY, Circuit Judge, dissenting:

With all respect to the majority, I disagree with its conclusion that the Eleventh Amendment does not bar this action against the University and its officers acting in their official capacities.

As the majority opinion recognizes, we have previously held that the University of California is an arm of the California State Government entitled to Eleventh Amendment immunity from suit in federal court. E.g., *Thompson v. City of Los Angeles, 885*

F.2d 1439, 1443 (9th Cir. 1989) ("It has long been established that UC is an instrumentality of the state for purposes of the Eleventh Amendment"); *BV Engineering v. Univ. of Calif., Los Angeles, 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*. In my view, these cases are controlling, and there is no call to reassess the status of the University in the absence of a change in its structure. If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived. *BV Engineering, 858 F.2d at 1396.*

The majority, however, does decide anew the question of the University's immunity. In so doing, it reaches an incorrect result. The majority applies a five-factor test that originated in *Mitchell v. Los Angeles Community College District, 861 F.2d 198, 201 (9th Cir. 1988)*, cert. denied, *490 U.S. 1081 (1989)*, and was repeated in *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*, and *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993)*. The listed factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 1292. The majority here agrees that factor [2] favors immunity; the University has long been recognized as performing functions of the central government. The majority states, however, that factors [3], [4], and [5] work against immunity, because the University may sue or be sued, may take property in its own name, and enjoys corporate status. But none of these three attributes of the University of California has changed since we held it to be entitled to Eleventh Amendment immunity. Once

we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play should be put to rest.

The crux of the majority's decision, as its opinion states, lies in the first factor. "The source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction." *Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981)*, aff'd sub nom. *Kush v. Rutledge, 460 U.S. 719, 75 L. Ed. 2d 413, 103 S. Ct. 1483 (1983)*. In my view, however, this factor must be viewed as a legal, not an economic matter. "The question is whether the state treasury is legally obligated." *Durning, 950 F.2d at 1425 n.3.*

No one has disputed that a judgment against the University of California is a legal obligation of the State of California. The majority opinion concludes, however, that the agreement of the United States to "indemnify and hold the University harmless against any . . . judgment or liability" arising out of its management of the Laboratory changes the Eleventh Amendment analysis. But that contractual clause is a separate matter. A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Several of our decisions establish that Eleventh Amendment immunity turns on the formal legal liability of the State, and not the economic impact of the judgment. In *Markowitz v. United States, 650 F.2d 205, 206 (9th Cir. 1981)*, we held that a State was entitled to Eleventh Amendment immunity even if it had liability insurance that would ultimately pay the judgment. It is true that part of our reasoning was that state funds pay the insurance premiums, *id.*, but the same indirect economic consequences are present here. If the United States did not agree to indemnify the University, the University's charge for managing

the Laboratory would have to be higher. Lower receipts by the University are a form of insurance premium payment to the United States.

Conversely, the fact that a State volunteers to pay a judgment incurred by an agency does not create Eleventh Amendment immunity because the question is whether the state has a legal liability to pay the judgment. *Durning, 950 F.2d at 1425, n.3.* Indeed, a suit against an individual officer does not become a suit against the State for Eleventh Amendment purposes even if a state statute provides that the officer may sue the State to recover indemnity. *Blaylock v. Schwinden, 862 F.2d 1352, 1353-54 (9th Cir. 1988); Demery v. Kupperman, 735 F.2d 1139, 1147-48 (9th Cir. 1984),* cert. denied, *469 U.S. 1127 (1985).* The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought. Here it is the State.

One difficulty with taking the federal indemnity agreement into account is that it is a judicial exercise that has no natural boundary. In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

I would avoid all of these difficulties, first, by relying on our established precedent holding that the University of California is entitled to Eleventh Amendment immunity. If I failed in that approach, I would hold that the first Mitchell factor rendered the University immune, because the judgment sought against it would

be a legal liability of the State. The University officials being sued in their official capacity would then share in the Eleventh Amendment immunity of the State. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).* The result would be to affirm the judgment of the district court that the Eleventh Amendment bars it from entertaining this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	No. C-92-2284 SAW
vs.	)	
	)	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, CLARK GROSECLOSE, ROBERT PERRET, ROBERT PERKO, UNIVERSITY OF CALIFORNIA, DAVID GARDNER,	)	
Defendants.	)	

Decided and Filed February 5, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, PhD.,[1] is a mathematical physicist. Plaintiff alleges that he was offered, and in June of 1991, accepted, a position as a physicist at Defendant Lawrence

[1] Plaintiff asserts that he cannot sue in his own name because "to do so would cause him to be barred from essentially all professional employment."

Livermore National Laboratory ("Lab"). The Lab is operated by the University of California ("UC") under contract with the U.S. Department of Energy ("DOE").[2] The offer for employment included a salary of $6,100 per month and a requirement that Plaintiff obtain a security clearance from DOE.[3] Plaintiff further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because the Lab and its personnel concluded that Plaintiff could not obtain a security clearance from DOE.

On October 22, 1992, Plaintiff filed his first amended complaint, alleging breach of employment contract against Defendants Lab, Nuckolls, UC, and Gardner; and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"), against Defendants Lab, Nuckolls, Groseclose, Perret, Perko, UC, and Gardner.[4] Defendants Nuckolls and Gardner move to dismiss the breach of contract claim against them on the ground that they are not parties to an employment contract with Plaintiff.[5] Defendants UC, Lab, Gardner, and Nuckolls move to

[2] Defendant John Nuckolls is Director of the Lab. Defendant David Gardner is President of UC. Defendants Clark Groseclose, Robert Perret, and Robert Perko are employed by UC at the Lab.

[3] Plaintiff asserts that the employment contract provided him a "reasonable period of time after he became an employee" of the Lab in which to obtain a security clearance. Defendants disagree, asserting that the employment offer was "conditioned upon Plaintiff's being able to obtain the requisite security clearance."

[4] Plaintiff also alleged failure to enforce security regulations against federal Defendants DOE, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs). On November 25, 1992, the parties agreed to dismiss, with prejudice, all causes of action against the federal defendants.

[5] Plaintiff concedes that only UC may be liable for the breach of employment contract claim. Accordingly, Nuckolls and Gardner's motion to dismiss the contract claim against them is granted.

dismiss the Section 1983 claim on the ground that they are not "persons" within the meaning of 42 U.S.C. § 1983. Defendants Groseclose, Perret, Perko, and Nuckolls move to dismiss the Section 1983 claim on the grounds that it is barred by the statute of limitations and it fails to state a claim upon which relief can be granted.

II. DISCUSSION

A. The Meaning of "Person" Under Section 1983

Defendants Lab, UC, Nuckolls, and Gardner assert that they must be dismissed from the Section 1983 claim for relief because they are not "persons" within the meaning of 42 U.S.C. § 1983.[6]

States, and governmental entities which are considered "arms of the state" for Eleventh Amendment purposes are not "persons" within the meaning of Section 1983, and are thus not subject to Section 1983 liability. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). UC is an arm of the state for purposes of the Eleventh Amendment. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). Accordingly, Defendants UC and Lab (an entity operated by UC) are not "persons" within the meaning of Section 1983, and Plaintiff's Section 1983 cause of action against them is dismissed.

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[6] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Suits against officials in their official, as opposed to individual, capacities are not suits against "persons" within the meaning of Section 1983. *Will*, 491 U.S. at 70-71. Because Defendants Gardner and Nuckolls are being sued in their official capacities, they are not "persons" within the meaning of Section 1983 and therefore Plaintiff's Section 1983 cause of action against them in their official capacities is dismissed.[7] Because Defendant Nuckolls has also been sued in his individual capacity, Plaintiff's Section 1983 cause of action against him in this capacity is not barred under Section 1983. *See Hafer v. Melo*, 112 S.Ct. 358 (1991).

B. Statute of Limitations Under Section 1983

Defendants Groseclose, Perret, Perko, and Nuckolls assert that the Section 1983 claims against them are barred by the statute of limitations. The statute of limitations for a Section 1983 action brought in California is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

Plaintiff's initial Complaint, filed June 18, 1992, alleges that Defendant Nuckolls, in his official capacity, denied Plaintiff due process and violated federal law by refusing to employ Plaintiff at the Lab in July of 1991. Plaintiff's First Amended Complaint, filed October 22, 1992 (more than one year after the actions complained of occurred), alleges the same violations against new Defendants Groseclose, Perko, and Perret, in their individual capacities, and adds Defendant Nuckolls in his individual capacity. Thus, unless the claims alleged in the First Amended Complaint "relate back" to the initial Complaint, Plaintiff's 1983 claims against these persons are time-barred.

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[7] One exception to the rule disallowing Section 1983 claims against persons sued in their official capacities is where the plaintiff seeks prospective injunctive relief. *See Quern v. Jordan*, 440 U.S. 332, 337 (1978). This exception is not applicable here, however, because Plaintiff has not prayed for such relief.

1. Defendants Groseclose, Perret, and Perko

Under Fed. R. Civ. P. 15(c), an amended complaint which names new parties will relate back to the date of the original complaint if three conditions are met. First, the claims asserted in the amended complaint must have "arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, the party to be named by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Third, the party to be named by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Tafari v. Chevron Corp.*, 1992 U.S. Dist. LEXIS 19085 (N.D. Cal. 1992) (quoting Fed. R. Civ. P. 15(c)).

Plaintiff has submitted no evidence that Defendants Groseclose, Perret, or Perko knew or should have known that, but for Plaintiff's mistake concerning their identities, the initial complaint would have been brought against them. Indeed, Plaintiff has not even alleged that a mistake was made when the initial complaint was filed. Because Plaintiff has not met the third condition required by Fed. R. Civ. P. 15(c), the Section 1983 claims brought against Defendants Groseclose, Perret, and Perko in First Amendment Complaint do not relate back to the initial Complaint, and are therefore time-barred. *See Hill v. Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991) (quoting *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)) ("[A] new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.").

2. Defendant Nuckolls

Unlike Defendants Groseclose, Perret, and Perko, however, Defendant Nuckolls was named in the initial complaint. The initial complaint named Defendant Nuckolls in his official

capacity, and the First Amended Complaint merely added Nuckolls as a Defendant in his individual capacity.

According to the Advisory Committee Note to the 1991 amendments to Rule 15(c), "the rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." The amendment aims to protect a plaintiff from a statute of limitations defense "where the original complaint sues the correct party but identifies him by a technically incorrect name." *Hill*, 924 F.2d at 1374 n.2. Such is the case here. Defendant Nuckolls was properly identified in the initial Complaint but was incorrectly named in his official capacity, rather than in his individual capacity. *See id.* As a Defendant in the initial Complaint, Nuckolls had notice of Plaintiff's claims against him within the limitations period. Accordingly, the Section 1983 claim brought against Defendant Nuckolls in his individual capacity relates back to the initial Complaint, and is therefore not time barred. *See id.*; *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980).

C. Failure to State a Claim Under Section 1983

A district court may dismiss a complaint or claim for relief if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Nonetheless, such motions to dismiss are disfavored and rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). -Upon consideration of such a motion, the court must consider the pleadings in a light most favorable to plaintiff. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

Defendants assert that, notwithstanding a statute of limitations defense, Plaintiff's Section 1983 claims must be dismissed because they fail to state a claim upon which relief can be granted. Specifically, Defendants assert that the "right" which Plaintiff alleges he was deprived of (a DOE security clearance) is not recognized by law as a "right," citing *Department of the Navy v.*

Egan, 484 U.S. 518, 528 (1988) ("[N]o one has a "right" to a security clearance."). Defendants further assert that Plaintiff does not have a property interest sufficient to entitle Plaintiff to procedural due process.

Defendants' argument is not well-taken. First, Plaintiff sues not for a deprivation of a right to a security clearance, but rather alleges that he was "deprived of his constitutional right to (procedural) due process of law in the determination of his eligibility for a DOE security clearance." Plaintiff's Brief Opposing Motion to Dismiss, at 6. An analogous claim has been recognized by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 502 (1958) ("[E]xecutive agenc[ies are not empowered] to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest."). Considering Plaintiff's allegations in a light most favorable to him, he may be able to state a cause of action based on the reasoning in *Greene*. Similarly, Plaintiff may be able to show that he is a party to a valid employment contract, and thus has a property interest sufficient to entitle him to procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971) (university employees dismissed during the terms of their contracts have interests in continued employment which are safeguarded by due process). Accordingly, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

Accordingly, IT IS HEREBY ORDERED that:

(1) All Plaintiff's causes of action against Defendant Gardner are dismissed;

(2) Plaintiff's breach of contract cause of action against Defendant Nuckolls is dismissed;

(3) Plaintiff's Section 1983 cause of action Defendant Nuckolls in his official capacity is dismissed;

(4) Plaintiff's Section 1983 cause of action against Defendants UC, Lab, Groseclose, Perret, and Perko is dismissed;

Dated: February 5, 1993.

/s/ Stanley A. Weigel
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	)	
Plaintiffs,	)	
	)	No. C-92-2284 SAW
vs.	)	
UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS,	)	
Defendants.	)	

Decided June 23, 1993
Filed June 24, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe, Ph.D, is a mathematical physicist who alleges that he was offered and accepted a position with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because they concluded that Doe could not obtain a U.S. Department of Energy security clearance — a requirement for LLNL employment.

On April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-action complaint alleging breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"). Defendants move to dismiss the Section 1983 claim against Defendants University of California ("University"), LLNL, and John Nuckolls in his official capacity. Defendants further move to dismiss the breach of contract claim against the University and LLNL. Plaintiffs oppose the motions.

II. DISCUSSION

A. Motion to Dismiss Section 1983 Claim Against the University and LLNL

On February 5, 1993, the Court held that "governmental entities which are considered 'arms of the state' for Eleventh Amendment purposes are not 'persons' within the meaning of Section 1983, and are thus not subject to Section 1983 liability." (Citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989)). The Court further held that because the University and LLNL are "arms of the state" they are not subject to Section 1983 liability. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against the University and LLNL. *See* February 5, 1993 Memorandum and Order ("February 5 Order"), at 3.

Nonetheless, contrary to the Court's order, Plaintiffs appear to have again alleged, in the second amended complaint, a Section 1983 claim against the University and LLNL. For the reasons stated above, the Court must dismiss Plaintiffs' Section 1983 claim against these defendants.

B. Motion to Dismiss Section 1983 Claim Against John Nuckolls in his Official Capacity

On February 5, 1993, the Court held that "suits against officials in their official, as opposed to individual, capacities are

not suits against 'persons' within the meaning of Section 1983," and are thus not subject to Section 1983 liability. (Citing *Will*, 491 U.S. at 70-71.) The Court further held that because Nuckolls was being sued in his official capacity, he is not subject to Section 1983 liability. Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against Nuckolls in his official capacity. *See* February 5 Order, at 3.

The Court noted in footnote 7 of the February 5 Order an exception to the rule disallowing Section 1983 claims against persons acting in their official capacity — where a plaintiff seeks prospective injunctive relief. (Citing *Quern v. Jordan*, 440 U.S. 332, 337 (1978). The Court held the exception inapplicable to Nuckolls because Doe had not prayed for such relief.

Attempting to utilize the prospective injunctive relief exception, Plaintiffs filed a second amended complaint which prays for a court order requiring Nuckolls, in his official capacity, to hire Doe at LLNL in accordance with the alleged employment contract. *See* Second Amended Complaint, at 7 ¶ (5). Plaintiff further prays for a court order requiring Doe's "application for employment at the LLNL to be reconsidered without reference to his perceived eligibility for a [Department of Energy] security clearance." Second Amended Complaint, at 7 ¶ (6).

Plaintiff's attempt is not well-taken. The Court has already held that "an injunction which would require Nuckolls to employ [Doe] at LLNL is not prospective injunctive relief because such relief relates solely to an alleged past violation of federal law." *See* March 25, 1993 Memorandum and Order ("March 25 Order") at 3. (Citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Further, because an injunction requiring Nuckolls to reconsider Doe's application also "relates solely to an alleged past violation of federal law," it too is not prospective injunctive relief. *See Papasan*, 478 U.S. at 277-78; *Green*, 474 U.S. at 68. Accordingly, Doe's Section 1983

claim against Nuckolls in his official capacity[1] must be dismissed.[2] *See Will*, 491 U.S. at 70-71.

C. Motion to Dismiss Breach of Contract Claim Against the University and LLNL

Defendants assert that the Eleventh Amendment bars Plaintiffs' breach of contract claim against the University and LLNL. Defendants' assertion is well-taken.

The Eleventh Amendment bars a citizen from bringing suit in federal court against their own state or "arms of the state." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1984); *Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991). The Eleventh Amendment does not bar such suits, however, if: (1) the state waives its immunity and consents to be sued in federal court; or (2) Congress creates a cause of action for damages against an unconsenting state. *See BV Eng'g v. University of Cal.*, 858 F.2d 1394, 1395-96 (9th Cir. 1988).

The Court has held that the University and LLNL are "arms of the state" for Eleventh Amendment purposes. *See* February 5 Order, at 3. The Court has also held that California has not waived its immunity and consented to be sued in federal court. *See* March 25 Order, at 3 n.5. Further, Plaintiffs' breach of contract claim is a state cause of action, not one which is congressionally created. Accordingly, because the Eleventh Amendment bars Plaintiffs' suit against the University and LLNL,

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[1] Because Plaintiffs' claim against Nuckolls in his individual capacity is not barred by Section 1983, it is not dismissed. *See Hafer v. Melo*, 112 S. Ct. 358 (1991).

[2] Because members of the class (other than Doe) do seek prospective injunctive relief, their Section 1983 claim against Nuckolls in his official capacity is not dismissed.

the breach of contract claim against these defendants must be dismissed. *See BV Eng'g*, 858 F.2d 1394.[3]

Accordingly, IT IS HEREBY ORDERED that:

(1) Plaintiffs' Section 1983 claim against the University and LLNL is DISMISSED with prejudice;

(2) Plaintiff Doe's Section 1983 claim against John Nuckolls in his official capacity is DISMISSED with prejudice; and

(3) Plaintiffs' breach of contract claim against the University and LLNL is DISMISSED with prejudice.

Dated: June 23, 1993.

/s/ Stanley A. Weigel
Judge

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[3] Doe requests that if the Eleventh Amendment bars Plaintiffs' claims in federal court, the Court transfer the case to state court rather than dismiss it. Doe cites no support for this request, and the Court finds no such precedent. Doe's request is accordingly denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated, Plaintiffs, vs. UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS, Defendants	)	No. C-92-2284 SAW

Decided and Filed September 2, 1993

MEMORANDUM AND ORDER

I. BACKGROUND

Plaintiff Dr. John Doe is a mathematical physicist who alleges that he was offered and accepted a position as a physicist with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because LLNL and its personnel concluded that Doe could not obtain a Department of Energy security clearance — a requirement for employment with LLNL.

Based on the foregoing allegations, on April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-

action complaint against Defendants for breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim").[1] On June 23, 1993, upon motion by Defendants, the Court dismissed Plaintiffs' Section 1983 claim against Defendants University of California ("UC") and LLNL, and Doe's Section 1983 claim against John Nuckolls in his official capacity. The Court further dismissed Plaintiffs' breach of contract claim against UC and LLNL.

Doe moves to certify for appeal, under Fed. R. Civ. P. 54(b), two of the dismissed claims: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In the alternative, Doe moves to certify for appeal these claims under 28 U.S.C. § 1292(b). Doe further moves to stay all proceedings pending the appeal. Defendants oppose the motions for certification.

II. DISCUSSION

A. Motion for Certification Under Rule 54(b)

As noted above, Doe seeks to appeal two claims dismissed in the Court's June 23, 1993 Memorandum and Order: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In order to do so, Doe seeks a final judgment on these claims pursuant to Federal Rule of Civil Procedure 54(b).

The district court has broad discretion to enter final judgment of particular claims under Rule 54(b) and to facilitate an appeal of those claims if there is no just reason for delaying the appeal. Fed. R. Civ. P. 54(b); *see also Texaco, Inc. v. Ponsdolt*, 939

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[1] Doe voluntarily dismissed the original complaint, filed June 17, 1992. On February 5, 1993, the Court dismissed in most respects Doe's first amended complaint. On March 25, 1993, the Court granted Doe's motion to file the second amended complaint.

F.2d 794, 798 (9th Cir. 1991). In considering a Rule 54(b) motion, the court should adopt a pragmatic approach, focusing on the severability of the dismissed claims from the remaining claims and efficient judicial administration. *Texaco*, 939 F.2d at 798; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Under the circumstances of this case, a Rule 54(b) final judgment of the dismissed breach of contract claim against UC and Section 1983 claim against Nuckolls in his official capacity is proper. First, the dismissed claims are severable from the remaining claims. The dismissed claim against Nuckolls in his *official* capacity is solely for *injunctive* relief. The only remaining claim brought by Doe is against Nuckolls in his *individual* capacity and only for *damages*. The dismissed claim against UC is a relatively straightforward breach of contract claim. There are no remaining claims against UC. There is a remaining claim against Nuckolls in his official capacity for injunctive relief, but that claim is brought by the class — which has yet to be certified.

Second, entering final judgment of the claim would result in efficient judicial administration. Doe has stated that he desires to remain in federal court, "but can sensibly do so only" if the federal court has jurisdiction to consider the breach of contract claim against UC. *See* Brief Supporting Motion for Stay and for Certification to Appeal 2. Presumably, if Doe loses on appeal, he will refile the complaint in state court. Therefore, by certifying the claims for appeal, the Court may be prevented from expending judicial resources in adjudicating the remaining claims, which would be rendered moot if Plaintiffs proceed in state court.

In light of the foregoing, the Court can find no just reason for delaying appeal on Plaintiffs' breach of contract claim against UC and Doe's Section 1983 claim against Nuckolls in his official

capacity. Accordingly, Doe's motion to certify these claims under Rule 54(b) is granted.[2]

B. Motion for Stay Pending Appeal

Doe moves to stay the Court proceedings pending resolution of the certified appeal by the Ninth Circuit.

If a district court certifies claims for appeal pursuant to Rule 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so. *See Matek v. Murat*, 638 F. Supp. 775, 784 (C.D. Cal. 1986). As noted above, it is presumed that if Plaintiffs lose on appeal, they will refile the action in state court. Accordingly, the interests of efficiency and fairness are served by staying further proceedings in this Court because the remaining claims would be rendered moot if Plaintiffs proceed in state court. Moreover, Defendants do not object to Doe's request for a stay. *See Armstrong v. A.C. & S., Inc.*, 649 F. Supp. 161, 162 (W.D. Wash. 1986) (motion for stay granted if motion unopposed). For the foregoing reasons, Doe's motion to stay is granted.

Accordingly, it is HEREBY ORDERED that:

(1) Pursuant to Federal Rule of Civil Procedure 54(b), the Clerk of the Court shall enter judgments of dismissal as to Plaintiffs' claim for breach of contract against Defendant University of California and Plaintiff Doe's claim under 42 U.S.C. § 1983 against Defendant John Nuckolls in his official capacity;

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[2] Because the Court grants Doe's motion for certification under Rule 54(b), his alternative motion for certification under 28 U.S.C. § 1292(b) is denied, as being moot.

(2) All proceedings in this action in this Court are stayed pending decision by the Ninth Circuit on the appeal of the foregoing claims; and

(3) Commencing ninety (90) days from now, Plaintiff Doe shall report to the Court the status of said appeal and shall do so every thirty (30) days thereafter.

Dated: September 2, 1993.

/s/ Stanley A. Weigel
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DR JOHN DOE, PHD.	)	
	)	
Plaintiff,	)	
	)	C 92-2284 SAW
vs	)	
	)	JUDGMENT
UNIVERSITY OF CALIFORNIA, et al.,	)	
	)	
Defendants.	)	

Filed September 13, 1993

In accordance with the *Memorandum and Order* of September 2, 1993,

IT IS HEREBY ADJUDGED that Plaintiff's claim for breach of contract against Defendant University of California and Plaintiff's claim under 42 U.S.C. Section 1983 against Defendant John Nuckolls in his official capacity are dismissed.

September 13, 1993

/s/ Stanley A. Weigel
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, Ph.D., and all others similarly situated,	)	
	)	
	)	No. 93-16792
Plaintiffs-Appellants,	)	
	)	D.C. No. CV-92-02284-SAW
	)	Northern District of California
v.	)	
	)	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,	)	ORDER
	)	
Defendants,	)	
	)	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	
	)	
Defendant-Appellee.	)	

Filed January 19, 1996

Before: CHOY, CANBY AND T.G. NELSON, Circuit Judges.

There having been no objection made by appellants Dr. John Doe, Ph.D., et al., to the request made by appellees John Nuckolls and the University of California that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby GRANTED.

A majority of the panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED APR 7, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DR. JOHN DOE, Ph.D., and all others similarly situated,	) No. C-92-2284 SAW) Class Action
Plaintiffs,	) Plaintiffs') SECOND AMENDED) COMPLAINT) FOR
v.	
LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director, and the UNIVERSITY OF CALIFORNIA,	) INJUNCTION & DAMAGES) UNDER § 1983) AND) SPECIFIC PERFORMANCE) & DAMAGES) FOR
Defendants.	) BREACH OF EMPLOYMENT) CONTRACT) *CATEGORY*: CIVIL RIGHTS, JOBS

Introduction

1. Plaintiff Doe is a mathematical physicist who cannot sue in his own name because to do so would cause him to be barred from essentially all professional employment as such. Defendants Lawrence Livermore National Laboratory ("LLNL") and the University of California ("UC") refuse to perform their contract of employment with Plaintiff Doe because their personnel determined that Plaintiff Doe could not obtain a security clearance from the Department of Energy ("DOE"), in violation of 42 U.S.C. § 1983. The alleged class consists of all applicants for employment at the LLNL who were, are and will be subject to Defendants' policy and practice of making employment suitability

decisions based on their estimate of the time required for these applicants to obtain security clearances from the DOE.

Plaintiffs seek a declaratory judgment declaring the foregoing policy and practice of Defendants an unconstitutional deprivation of their right to procedural due process under the Fifth Amendment and a permanent injunction prohibiting Defendants from using, condoning, or tolerating it. In addition, Plaintiff Doe seeks specific performance of the alleged employment contract or an injunction under 42 U.S.C. § 1983 requiring him to be hired under the terms of the foregoing contract, as well as appropriate back pay at over $70,000 per year for himself, and an attorney's fee.

Jurisdiction

2. Jurisdiction is based on 28 U.S.C. § 1331 (federal question) and on 28 U.S.C. § 1332 (diversity of citizenship). The amount in controversy easily exceeds $50,000. This action arises, *inter alia*, under Executive Order 10865, DOE Regulations in Title 10, Part 710 of the Code of Federal Regulations, and 42 U.S.C. § 1983.

Venue

3. Venue is proper in the Northern District of California because Defendant LLNL is located in Livermore and Defendant University of California operates a university in Berkeley.

Parties

4. Plaintiff Dr. John Doe, Ph.D., is a mathematical physicist and a resident of the State of New York. All members of the alleged class are applicants for employment at the LLNL whose positions require security clearances from the DOE or for whom applications for such clearances have usually been submitted to the DOE by Defendants.

5. Defendant Lawrence Livermore National Laboratory ("LLNL") is an entity owned by the United States Department of Energy ("DOE") and operated by Defendant University of California ("UC") under contract with the DOE. Except for security clearances, Defendant UC has complete and ultimate control of all employment matters regarding LLNL personnel, including applicants for LLNL employment, and LLNL employees are paid by the UC. The DOE has sole and exclusive authority over security clearances for LLNL employees and applicants for LLNL employment.

6. Defendant John Nuckolls is the Director of the LLNL, and he is sued in both his official and individual capacities.

Factual Allegations for All Claims

7. Plaintiff Dr. John Doe, Ph.D., is a mathematical physicist who was graduated *summa cum laude* from Princeton in 1976, received an M.A. from Harvard in 1977, and a Ph.D. from Harvard in 1981. During his professional career he served as a teaching fellow at Harvard, an assistant professor at Rockefeller University, a Member of the Institute for Advanced Study at Princeton, a visiting professor at the Lawrence Berkeley National Laboratory, and a consultant on theoretical physics for the Lawrence Livermore National Laboratory (Defendant LLNL, herein). In addition, Dr. Doe has given numerous invited talks at conferences in this country and in Europe and has published over three dozen technical papers in his field.

8. From on or before October 1990 to mid-June 1991, personnel at Defendant LLNL actively recruited Plaintiff Doe as a potential employee, whom they believed was a very able theoretical physicist.

9. In mid-June 1991, Plaintiff Doe orally accepted the LLNL's oral offer of employment and accepted the LLNL's written offer of employment in writing. The offer for employment as a physicist included a salary of $6,100 per month

and a requirement that Plaintiff Doe obtain a "Q" security clearance from the DOE in a reasonable period of time after he became an employee of Defendant LLNL.

10. Shortly after Plaintiff Doe had accepted the foregoing offer, both orally and in writing, Defendant LLNL attempted to "withdraw" the offer and refused to employ Plaintiff Doe in any position. The LLNL did so because its personnel determined that Plaintiff Doe could not obtain a security clearance from the DOE in any period of time, reasonable or otherwise.

11. Federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR), provide that only the DOE may determine eligibility for a DOE security clearance, not any other entity such as Defendant LLNL or its employees.

12. In the months that followed, Plaintiff Doe attempted to persuade Defendant LLNL to honor its employment contract with him by means of communications between his attorney and the LLNL, his own efforts to meet with LLNL personnel, his communications with DOE personnel, and by communications between Admiral Watkins and Congressman John Dingell on Plaintiff Doe's behalf, all to no avail.

13. Defendants LLNL, Nuckolls, and University of California have an ongoing and continuing policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of Federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR).

Class Action Allegations

14. Plaintiff brings this action on behalf of himself and all others similarly situated under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Class consists of all past, present and future applicants for employment at the Lawrence Livermore National Laboratory ("LLNL") whose positions require a security clearance from the Department of Energy ("DOE") or for whom Defendants have customarily submitted applications to the DOE for such clearances, thereby becoming subject to Defendants' unlawful policy and practice of making employment decisions based on defendants' estimate of the time required for these applicants to obtain the foregoing security clearances.

15. Defendants, through Defendant Director Nuckolls and other employees and agents who work at the LLNL, have admitted the existence and use of the foregoing policy and practice, and have stated their desire and intention to continue to use it in the future. Defendants have failed and refused to abandon this policy and practice, despite Plaintiff Doe's repeated requests that they do so.

16. There are common questions of law and fact affecting the rights of Class members who are, have been, and continue to be adversely affected by Defendants' unlawful policy and practice alleged above. These persons are so numerous that joinder is impracticable, and joinder of future members is impossible. The claims of the Representative Plaintiff are typical of those of the Class in that all allege the same discrimination by Defendants regarding the use of security clearance determinations in making employment decisions. A common relief is sought: a Declaratory Judgment that Defendants' alleged policy and practice violates the Due Process Clause of the Fifth Amendment, an Injunction enjoining all Defendants from using, condoning, or tolerating it, and back pay. The interests of the Class are adequately represented by Plaintiff John Doe, who has suffered and continues to suffer discrimination because he was and continues to be a victim of the foregoing policy and practice of the LLNL.

Defendants have acted and refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

17. Plaintiffs have no adequate remedy at law.

First Claim - Breach of Contract

18. Plaintiffs incorporate by reference all preceding paragraphs.

19. Defendants LLNL and UC breached their contract of employment with Plaintiff Doe, all to his damage in the amount of at least $6,100 per month plus benefits since July 1991.

20. The position sought by Plaintiff Doe is unique, in that his work would have begun with a project involving computer simulation of military battles in real time, to which he would have applied kinetic theory and other laws of physics. Work on this type of project is not generally available outside of a few institutions funded by the federal government, so that Plaintiff Doe is entitled to an order requiring specific performance of the alleged employment contract.

Second Claim - Violation of 42 U.S.C. Section 1983

21. Plaintiffs incorporate by reference all preceding paragraphs.

22. At all material times, Defendant Nuckolls was acting under the color of the law of the State of California and caused Plaintiff Doe and all other members of the alleged class, all citizens of the United States, to be deprived of rights secured by the United States Constitution and other federal laws, so that Defendants are liable to Plaintiffs in an action at law, suit in equity, or other proper proceeding for redress, as provided by 42 U.S.C. § 1983.

23. Defendants LLNL, Nuckolls, and University of California have a policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of Federal law, including Executive Order 10865 and the DOE's own security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR).

24. In deciding not to employ Plaintiff Doe and approving the recommendations of his subordinates not to do so, Defendant Nuckolls violated the foregoing federal law on security clearances by determining that Plaintiff Doe could not obtain a security clearance from the DOE.

25. Specifically, Defendants LLNL and Nuckolls deprived Plaintiff Doe of his right to due process of law under the Fifth Amendment by violating federal law on security clearances in deciding not to hire Plaintiff Doe, all to his damage in the amount of at least $6,100 per month plus benefits since July 1991, in violation of 42 U.S.C. § 1983.

26. In addition, Defendants LLNL and Nuckolls have deprived and will continue to deprive all Plaintiffs of their right to procedural due process of law under the Fifth Amendment by violating federal law on security clearances in deciding whether or not to hire Plaintiffs to work at the LLNL, in violation of 42 U.S.C. § 1983, thereby entitling them to appropriate declaratory relief and permanent injunctive relief.

RELIEF REQUESTED

(1) An Order certifying the alleged class;

(2) A Declaratory Judgment declaring that Defendants' policy and practice of making employment suitability decisions

based on Defendants' estimate of the time required for applicants for employment at the LLNL to obtain security clearances from the DOE is unconstitutional and unlawful;

(3) A permanent Injunction prohibiting Defendants from using, condoning, or tolerating the foregoing policy and practice;

(4) An Order for specific performance requiring Defendants LLNL and UC to employ Plaintiff Doe as an employee of the LLNL as a physicist, in accordance with the terms of the alleged contract between Plaintiff Doe and these defendants;

(5) An Injunction under 42 U.S.C. § 1983 requiring Defendant Nuckolls, in his official capacity as Director of the Lawrence Livermore National Laboratory, to cause Plaintiff Doe to be hired as a physicist at the LLNL, in accordance with the terms of the alleged contract;

(6) As a less-desirable alternative to (5), above, an Injunction under 42 U.S.C. § 1983 requiring Defendant Nuckolls, in his official capacity as Director of the LLNL, to cause Plaintiff Doe's application for employment at the LLNL to be reconsidered *without* reference to his perceived eligibility for a DOE security clearance or any other information acquired by Defendants after Plaintiff Doe informed them of his problem in obtaining a security clearance from the NSA;

(7) An Order requiring Defendants Lab, Nuckolls (in his individual capacity), and the University of California to compensate Plaintiff Doe with appropriate back pay and employment benefits that he would have received had these defendants hired him in accordance with the alleged contract, in the amount of at least $6,100 per month plus benefits, which at this time amounts to at least $100,000;

(8) An attorney's fee under 28 U.S.C. § 2412, 42 U.S.C. § 1988, and other applicable law;

(9) Costs; and,

(10) Such other and further relief, including equitable relief, as the Court may deem appropriate.

Dated: April 6, 1993

s/Richard Gayer
RICHARD GAYER, Plaintiffs' Lawyer.

MODIFICATION NO. M205, SUPPLEMENTAL AGREEMENT TO CONTRACT NO. W-7405-ENG-48:

ARTICLE VII, CL. 1 - COSTS AND EXPENSES (SEP 1991)* - DEAR 970.5204-13

(a) Compensation for contractor's services. Except for the provisions of Article XVII, "Litigation, Claims and Indemnification," payment for the allowable costs as hereinafter defined shall constitute full and complete compensation for the performance of the work under this contract.

(b) (Not applicable)

(c) Allowable costs. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) Reasonableness, including the exercise of prudent business judgment, as defined in paragraph (f) of this clause; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or as elsewhere provided in this contract as to types or amounts of items of cost. Allowable costs shall not include the cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) Items of allowable cost. Subject to the other provisions of this clause, the following items of cost of work done under this contract shall be allowable to the extent indicated.

* Modified for this contract.

(1) Bonds and insurance (including self-insurance), as required by Article IX, Clause 6, "Required Bonds and Insurance-Exclusive of Government Property," and indemnification as provided in Article XVII "Litigation, Claims and Indemnification," of this contract.

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraphs (e)(16) and (e)(26).

(4) Litigation and claims expenses, costs and judgments including interest thereon, incurred in accordance with Article XVII, Clause 1, "Litigation and Claims," and Article XVII, Clause 4, "General Indemnity," of this contract.

(5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the University in the performance of this contract, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the Contracting Officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with Article XII, Clause 1, "Patent Rights," of this contract.

(8) Laboratory employee personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the Contracting Officer. It is further understood and agreed that the University will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the University and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the Contracting Officer or his representative. Types of Laboratory employee personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (University) committees;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workers compensation plans, (whether or not covered by insurance); voluntary or agree-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval in accordance with the Article VII, Clause 13, "Foreign Travel," of this contract); incidental subsistence and other allowances of Laboratory employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards;

(v) Personnel training; including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work; and

(iv) Recruitment of personnel (including help-wanted advertisement), including service of employment agencies at rates not in excess of standards commercial rates, employment office, travel of prospective employees at the request of the University for employment interviews.

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities.

(10) Subcontracts and purchase orders, including procurements from University-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as authorized through the University's annual budget process.

(12) Taxes, fees, and charges levied by public agencies which the University is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with FAR 31.205-6(j)(3)(iv).

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to: service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters.

(16) Camp operations, to the extent approved by the Contracting Officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the extent not covered by rentals or insurance and as provided in rental agreements approved by the Contracting Officer.

(18) Rental for construction plant and equipment rented by the University from others at rates and under written agreements approved by the Contracting Officer.

(19) Costs and compensation associated with University management and operation of the Laboratory as described in Article V, Clauses 3, 4, 5, and 6, of this contract.

(20) Costs for University conducted research and support as described in Article VIII, Clause 2, of this contract.

(21) Fines and penalties, except those expressly made unallowable under paragraph (e)(12) of this clause.

(22) Employee assistance programs; health or first-aid clinics; house or employee publications.

(23) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

(e) Items of unallowable costs. The following items of costs are unallowable under this contract to the extent indicated, except as may be otherwise approved in writing by the Contracting Officer or as provided elsewhere in this contract:

(1) Advertising and public relations costs designed to promote the University or the Laboratory or its products, including the costs of promotional items and memorabilia such as models, gifts and souvenirs, and the cost of memberships in civic and community organizations; except those advertising and public relations costs:

(i) Specifically required by the contract,

(ii) Approved in advance by the Contracting Officer as clearly in furtherance of work performed under the contract,

(iii) That arise from requirements of the contract and that are exclusively for recruiting personnel, acquiring scarce items for contract performance, disposing of scrap or surplus materials, the transfer of federally owned or originated technology to State and local governments and to the private sector, or acquisition of contract-required supplies and services, or

(iv) Where the primary purpose of the activity is to facilitate contract performance in support of the DOE mission.

The term "designed to promote" does not include: the use of University or Laboratory name or logos in conjunction with correspondence and press releases or imprinted on materials to be used by Laboratory employees in the course of work performance, including, but not limited to stationery, binders, writing implements, displays, presentations, buttons identifying employees and/or their programs; the creation and display or performance of models, films, videotapes, audio presentations and the like, describing the technical, scientific, science education, technology transfer, and

business affirmative action efforts or achievements of the Laboratory; the operation of museums and public access centers.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the University.

(3) Proposal expenses and costs of proposals except in the conduct of the Work for Others program.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the University and employee prior to the rendering of the services or an established plan consistently followed by the University, (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the University, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.

(8) Contributions and donations, including cash, University-owned property and services, regardless of the recipient.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Code of 1954, as amended, including the straight-line, declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight line method), or sum-of-the-years digits method, on the basis of expected useful life,

to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment, including costs of amusement, diversion, social activities; and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities; costs of membership in any social, dining or country club or organization, except the costs of such recreational activities for on-site employees as may be approved by the Contracting Officer or provided for elsewhere in this contract.

(12)(i) Fines or penalties caused directly by bad faith or willful misconduct on the part of some officer or officers of the Regents of the University of California or any person acting as Laboratory Director; or

(ii) Criminal penalties assessed pursuant to 223(c) of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2273(c)) and as provided for in Article XVII, Clause 2(j), "Nuclear Indemnity Agreement," of this contract.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the University from others.

(14) Insurance (including any provisions of a self-insurance reserve) on any person where the University under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Article IX, Clause 1, "Property," of this contract.

(15) Interest, however represented (except (i) interest incurred in compliance with Article VII, Clause 14, "State and Local Taxes," of this contract, or, (ii) imputed interest costs relating to leases

classified and accounted for as capital leases under generally accepted accounting principles (GAAP), provided that the decision to enter into a capital leasing arrangement has been specifically authorized and approved by the DOE in accordance with applicable procedures and such interest costs are recorded in an appropriately specified DOE account established for such purpose), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services costs incurred in connection with: the preparation and issuance of stock, rights, organization or reorganization; the prosecution of judicial or administrative proceedings against the United States or the defense of judicial or administrative proceedings and investigations under the Major Fraud Act into alleged violations of statutes or regulations (as those terms are used in the Major Fraud Act) by the United States against the University, except as permitted by the Equal Access to Justice Act (28 U.S.C. § 2412 and 5 U.S.C. § 504) and the Major Fraud Act (41 U.S.C. § 256) and except as otherwise approved by the Contracting Officer; and the prosecution of patent infringement litigation, except where incurred pursuant to the Litigation and Claims clause of this contract. This provision shall not be applicable to costs incurred by the University in fulfillment of its responsibilities under this contract in normal, routine or informal interactions such as routine inspections, audits, and reviews of work by sponsors, with a state or the federal government.

(17) Losses (including litigation expenses, Counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the University's contributed portion under cost-sharing contracts; losses in connection with price reductions to and discount purchases by employees (excluding losses arising from the cost of operating cafeteria and food service operations) and other from any source; and losses where such losses or expenses:

(i) Are compensated for by insurance or otherwise or which would have been compensated by insurance required by law or by written

direction of the Contracting Officer but which the University failed to procure or maintain through the fault of some officer or officers of The Regents of the University of California or any person acting as Laboratory Director;

(ii) Result from willful misconduct or lack of good faith on the part of some officer or officers of The Regents of the University of California or any person acting as Laboratory Director;

(iii) Represent liabilities to third persons from which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

(19) Membership in trade, business, and professional organizations, except as approved by the Contracting Officer.

(20) Precontract costs, except as expressly made allowable under the provisions in this contract.

(21) (Not applicable)

(22) (Not applicable)

(23) (Not applicable)

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including listing of securities on exchanges, taxes which are paid contrary to Article VII, Clause 14, "State and Local Taxes" (provided that the Government's recovery of state and local taxes inadvertently paid shall be limited to any refund action pursued at the direction of the Contracting Officer), federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions

involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the University's central office or branch office organizations concerned with the general management, supervision, and conduct of the University's business as a whole, except to the extent that particular travel is in connection with the contract or approved by the Contracting Officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) (Not applicable)

(28) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance.

(30) Facilities capital cost of money. (CAS 414 and CAS 417).

(31) Cost incurred to influence (directly or indirectly) legislative action on any matter pending before Congress or a State legislature as delineated in Article VII, Clause 16, "Legislative Lobbying Cost Prohibition," of this contract.

(32) Commercial automobile rental expenses (exclusive of employee automobile rental while on travel, or short term use not to exceed 60 days) unless approved by the Contracting Officer.

(33) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the Government where the University, its agents or employees, has pleaded nolo contendere to a charge of fraud or similar proceeding or where such charge results in a judgment or a conviction; provided, however, that such costs incurred in defense of a civil fraud or similar proceeding brought against an employee or agent shall be allowable in accordance with Article XVII, Clause 1, "Litigation and Claims."

(34) Costs of alcoholic beverages.

(35) (Not applicable)

(36) Cost of attendance at any meeting or conference which the Contracting Officer may determine to be unallocable or unreasonable for application to this contract.

(f) Reasonable costs. A cost shall be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefor, reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made. Major considerations involved in the determination of the reasonableness of a cost are: (i) whether or not the cost is of a type generally recognized as necessary for the operation of the Laboratory or the performance of the contract; (ii) the restraints or requirements imposed by such factors as arm's-length bargaining, Federal and State laws and regulations, and contract terms and conditions; (iii) whether or not the individuals concerned acted with due prudence in the circumstances, considering their responsibilities to the Laboratory, its employees, the Government, and the public at large; and (iv) the extent to which the actions taken with respect to the incurrence of the cost are consistent with established University policies and practices

applicable to the work of the University generally, including federally-sponsored agreements.

(g) In the event the University fails to obtain a prior approval required of any action by the terms of this contract, the Contracting Officer may give after the fact approval to the extent that the Contracting Officer can determine that the Government sustained no loss as the result of the failure to obtain the prior approval or that such failure did not adversely affect the interests of the Government.

ARTICLE XVII, CL. 1 - LITIGATION AND CLAIMS (JUL 1991)* - DEAR 970.5204-31

(a) Initiation of Litigation and Claims. The University may, with the prior written authorization of the Contracting Officer, and may, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. If the University declines a government request to initiate litigation, it shall assign its rights and interests in the matter to permit the government to undertake the action. The cost and expense of litigation and claims incurred pursuant to this paragraph (a) shall be allowable costs under this contract. The University shall proceed with the litigation it undertakes, in good faith and as directed from to time by the Contracting Officer; provided, however, the University has the right to decline the directions of the Contracting Officer and may proceed with the litigation under its sole discretion and for its sole benefit, if the University assumes full responsibility for its litigation costs, including judgments.

(b) Defense and Settlement of Litigation and Claims.

(1) Except for litigation or claims between the United States and the University, and except for litigation or claims commenced by a State for violation of federal or state statute or regulation, the University shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, filed against the University arising out of the performance of this contract, and of any claim against the University, the cost and expense of which is allowable under this contract. The cost and expenses of litigation and claims, including judgments, incurred pursuant to this paragraph (b) shall be allowable costs under this contract. Except as otherwise directed by the Contracting Officer, in writing, the University shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the University with respect to such action or claim. To

* Modified for this contract.

the extent not in conflict with any applicable policy of insurance, the University may, with the Contracting Officer's approval, settle any such action or claim.

(2) Upon the Government's written acceptance and assurance of full responsibility for all University litigation or claim costs and expenses, including judgments, for such an action or claim, the University shall (i) effect, at the Contracting Officer's request, an assignment and subrogation in favor of the Government of all of the University's rights and claims (except those against the Government) arising out of such action or claim against the University and (ii) if requested by the Contracting Officer, shall authorize representatives of the Government to settle or defend such action or claim and to represent the University in, or take charge of such action; provided, however, the University has the right to decline any such Contracting Officer request under (i) or (ii) above and may proceed with the litigation under its sole direction in any action in which The Regents determine that a substantial institutional interest of the University is involved or in which equitable relief against the University is sought if the University assumes full responsibility for the litigation costs, including judgments.

(3) If the settlement or defense of any action or claim against the University is undertaken by the Government, the University (i) may, at its option, participate therein as an allowable cost without affecting its rights under this clause and (ii) shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action or claim against the University is not covered by a policy of insurance, the University shall, with the approval of the Contracting Office, proceed with the defense of the action in good faith and in such event the defense of the action or claim shall be at the expense of the Government; provided, however, that the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the University failed to secure or maintain through its own fault or negligence.

(c) Litigation and claims commenced by the United States against the University, or commenced by a State for violation of federal or state statute or regulation. The University shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, commenced against the University by the United States, or commenced by a State for violation of or failure to comply with a federal or state statute or regulation, arising from, or relating to, the University's performance of this contract. Except as precluded by (1) Article VII, Clause 1 (e)(16) and (33), (2) the Major Fraud Act (41 U.S.C. § 256) when a State or the United States is a party, and (3) the Equal Access to Justice Act (28 U.S.C. § 2412 and 5 U.S.C. § 504) when the United States is a party, the costs and expenses of litigation and claims, including judgments, incurred pursuant to this paragraph (c) shall be allowable costs under this contract. The University shall proceed with its defense against such action or claim and shall provide copies of all pleadings to the Contracting Officer. The University may, with the Contracting Officer's approval, settle any such action or claim.

(d) Defense and Indemnification of Employees.

(1) The parties recognize that, under California law, the University could be required to defend and indemnify its officers and employees from and against civil actions and other claims which arise out of the performance of work under this contract. Except for defense costs made unallowable by (i) Article VII, Clause 1 (e)(16) or (ii) the Major Fraud Act (41 U.S.C. § 256), the costs and expenses, including judgments, resulting from the defense and indemnification of employees from and against such civil actions and claims shall be allowable costs under this contract if incurred pursuant to the terms of this paragraph (d). Costs and expenses, including judgments, resulting from the defense and indemnification of employees from civil fraud actions filed in federal court by the United States government will be unallowable where the employee pleads nolo contendere or the action results in a judgment or a conviction.

(2) The University shall immediately furnish the Contracting Officer written notice of any such claim or civil action filed against any employee of the University arising out of the work under this contract together with copies of all pleadings filed. The University shall also furnish a written determination by an appropriate official to the University that (i) the defense or indemnity of the employee is required by the provisions of the California Government Code, (ii) the employee was acting in the scope of his employment at the time of the actions which gave rise to the civil action or indemnity, and (iii) the exclusion set forth under California law for fraud, corruption, or malice on the part of the employee does not apply. A copy of any reservation of rights letter which the University may assert under California law with respect to the defense or indemnity of such employee shall also be provided to the Contracting Officer. The costs associated with the settlement of any such civil action or claims, shall not be treated as an allowable cost under this contract without the prior written approval of the Contracting Officer.

(e) Costs and Expenses of Litigation. "Costs and expenses of litigation and claims" as used herein include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bear a direct and substantial relationship to the proceedings.

ARTICLE XVII, CL. 2 - NUCLEAR HAZARDS INDEMNITY AGREEMENT (NOV 1991) - DEAR 952.250-70

(a) Authority. This clause is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) Definitions. The definitions set out in the Act shall apply to this clause.

(c) Financial protection. Except as hereafter permitted or required in writing by DOE, the University will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE, however, may at any time require in writing that the University provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability, provided that the cost of such financial protection will be reimbursed to the University by DOE.

(d)(1) Indemnification. To the extent that the University and other persons indemnified are not compensated by any financial protection, permitted or required by DOE, DOE will indemnify the University and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the University and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (d)(1) of this clause is public liability which (i) arises out of or in connection with the

activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) Waiver of Defenses. In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the University, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which:

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(ii) Arises out of or results from or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility, or

(iii) Arises out of or results from the possession, operation, or use by the University or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the University, on behalf of itself and other persons indemnified, agrees to waive:

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to:

1 Negligence;

2 Contributory negligence;

3 Assumption of the risk; or-

4 Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God.

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term extraordinary nuclear occurrence means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR Part 840.

(vi) For the purposes of that determination "off-site" as that term is used in 10 CFR part 840 means away from "the contract location" which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any University-owned or controlled facility, installation, or site at which the University is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above:

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workers' compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e of the Act of 1954, as amended, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) Notification and litigation of claims. The University shall give immediate written notice to DOE of any known action or claim filed or made against the University or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the University shall furnish promptly to DOE, copies of all pertinent papers received by the University or filed with respect to such actions or claims. DOE shall have the right to,

and may collaborate with the University and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the University or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the University or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) Continuity of DOE obligations. The obligations of DOE under this clause shall not be affected by any failure on the part of the University to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the University, or by the completion, termination or expiration of this contract.

(h) Effect of other clauses. The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including Article XVI, Clause 3, "Disputes," provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, Officials Not to Benefit, and Examination of Records by Comptroller General, and any provisions later added to this contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) Civil penalties. Reserved

(j) Criminal penalties. Any individual director, officer, or employee of the University or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended,

and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) Inclusions in subcontracts. The University shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under this subcontract.

ARTICLE XVII, CL. 4 - GENERAL INDEMNITY (SPECIAL)

(a) DOE deems the performance of the work hereunder by the University to be essential in the interest of the common defense and security of the United States. DOE and the University recognize that, in part, this work involves unusual, unpredictable and abnormal risks.

(b) In view of these circumstances, it is agreed that all work under this contract is to be performed at the expense of the Government and that the University shall not be liable for and the Government shall indemnify and hold the University harmless against any delay, failure, loss or damages, judgment or liability (including personal injuries and deaths of persons and damage to property) and any expenses in connection therewith (including costs of damages, costs and expense of litigation and claims) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work. It is understood that the Government is obligated under this paragraph (b), whether or not any employee of the University is responsible therefor, unless any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract.

(c) The Government shall pay directly and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and when requested by the University, all claims which may be settled by agreement and approved by the Contracting Officer.

(d) The obligations of DOE under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress. To the extent that funds are not available for payment under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," DOE will use its best effort to obtain such funds.

(e) In the event that circumstances arise in the course of the work under this contract which could expose the University to financial liability arising from unusually hazardous or nuclear risks for which adequate protection is not provided under the terms of this contract, DOE agrees to consider in good faith a request from the University for indemnification against such risks under Public Law 85-804, in accordance with the procedures prescribed in Subpart 50.4 of the FAR and the no gain/no loss principle set forth in Article VI, Clause 2, of this contract.

Modification No. M205
Supplemental Agreement to
Contract No. W-7405-ENG-48

IN WITNESS HEREOF The parties hereto have executed this Supplemental Agreement as of the day and year first above written.

THE UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY

DATE: 11-20-92 BY: s/Donald W. Pearman, Jr.
Donald W. Pearman, Jr., Manager
San Francisco Field Office
Contracting Officer

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

DATE: 11-20-92 BY: s/Meredith J. Khachigian
Meredith J. Khachigian, Chairman

DATE: 11-20-92 BY: s/Bonnie M. Smotony
Bonnie M. Smotony, Secretary

DATE: 11-20-92 BY: s/Clair W. Burgener
Clair W. Burgener, Chairman
Committee on Oversight of the
Department of Energy Laboratories

APPROVED AS TO FORM: BY: s/Allen B. Wagner
Allen B. Wagner,
University Counsel of The Regents
of the University of California

DEPARTMENT OF ENERGY
San Francisco Operations Office
1301 Clay Street
Oakland, California 94612-5208

Nov 23 1993

Dr. B[] G[]
[street address]
New York, New York [zipcode]

Dear Dr. G[]:

This is in response to your telephone conversation with me earlier this month concerning the Lawrence Livermore National Laboratory's (LLNL's) withdrawal of its offer of employment to you in June 1991. Based upon a review of the correspondence in this matter, there appear to be two major issues in this controversy.

The first of these issues concerns the reasons given by various Laboratory employees at different times for the withdrawal of the offer of employment. In retrospect, it appears that the Laboratory was not entirely candid with you in initially defending its decisions as based on security concerns and concluding that you were not a viable candidate for a security clearance. In his letter of September 25, 1992, the Manager of the San Francisco Field Office concluded that the Laboratory process for documenting its decision and conveying that information to you was unsatisfactory. As you know, that letter went on to clearly state the Department's policy that employment decisions cannot be made on the basis of security clearance determinations which are solely within the province of DOE, while recognizing that the Laboratory was solely responsible for determining that an applicant is qualified and suitable to perform the duties of that position.

The SF Manager also requested that the Laboratory review your case and determine if there were additional actions LLNL should take. As you know the Laboratory subsequently reaffirmed its

decision not to hire you, apparently on grounds other than its conclusion as to whether you were a viable candidate for a security clearance. Based upon your conversation with me and other SF personnel, you view the different statements by various Laboratory employees at different times as inconsistent and intellectually dishonest. You also believe that the SF review of this matter, in your words, was "fraudulent."

The second major issue in your case is whether your accepted the Laboratory's offer before it was withdrawn, thereby creating a valid contract. I am informed that this is a purely technical legal issue.

Our records reflect that you filed a complaint with the Office of the Inspector General for the Department in October 1991, and that Congressman Bill Green wrote to the Department on your behalf in the same month. You subsequently initiated litigation against the Department, the University of California and LLNL Director John Nuckolls based on the Laboratory's decision not to hire you. Depositions of the SF Manager and LLNL employees involved in this matter were taken. Thereafter, the Complaint was amended to eliminate the Department as a defendant. The U.S. District Court in San Francisco later granted the University's Motion to Dismiss UC, and John Nuckolls, in his official capacity, as defendants based on the 11th Amendment of the United States Constitution. I understand that your action against Director Nuckolls, in his personal capacity, continues in federal court, and that you have filed an appeal with the 9th Circuit U.S. Court of Appeals.

The substance of your complaint, and action you request, is that the Department should do the right thing and direct the Laboratory to hire you. This would also permit the Department to determine your eligibility for a security clearance. I believe that the Department has done everything it can legally do under the circumstances of your case, and I cannot take the action you have requested.

The Lawrence Livermore National Laboratory (LLNL) is a Government-owned facility which is primarily funded by the Department of Energy. The University of California manages and

operates LLNL for the Department, and the rights and obligations of the University and the Department are defined by Contract Number W-7405-ENG-48. Under the contract, the Department does not have the right to substitute its judgment as to your qualifications and suitability for employment for that of the Laboratory and direct that you be hired by the Laboratory. (This is generally the case under all Government contracts.)

Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts. Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

Moreover, allegations of fraud, waste and abuse are within the exclusive jurisdiction of the Department's Office of Inspector General. In this respect, I understand that the OIG continues to be interested in your case.

Finally, I am also aware that, since the withdrawal of LLNL's offer of employment in June 1991, you have sought to resolve your grievance informally at the highest levels of the Department, the executive and legislative branches of the federal government, the University of California and the state government. I can also understand your frustration that two years of conscientious and persistent effort on your part has not been able to resolve the issues. I also know that our position in this matter is unacceptable to you. However, I believe that the Department has done everything it can

legally do under the contract with the University of California, and that we must await the outcome of your litigation.

Sincerely,

[Signature]

Martin J. Domagala
Acting Deputy Manager

No. 95 - 1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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August 15, 1996

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QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The Petitioners in this case are The Regents of the University of California and John Nuckolls, a University official sued in his capacity as Director of the Lawrence Livermore National Laboratory. Petitioners were defendants in the District Court and appellees in the Court of Appeals.

John Doe, Ph.D., on behalf of himself and all others similarly situated, was the plaintiff in the District Court and the appellant in the Court of Appeals. The plaintiff's motion for class certification remains pending in District Court. *See* J.A. 39a.

In the Court of Appeals, the "Lawrence Livermore National Laboratory" was named by Respondent Doe as an appellee, but he correctly recognized in his briefs to the Court of Appeals that the Laboratory is not a legal entity but only a physical facility owned by the United States Department of Energy and managed by the University. No entity denominated the "Lawrence Livermore National Laboratory" was represented on briefs in the Court of Appeals, and the Laboratory was not otherwise a "party" to the proceeding below separate and distinct from the University and Nuckolls.

A number of federal officials were originally named as defendants in the District Court, but they were dismissed pursuant to stipulation and were not parties in the Court of Appeals. There were no other parties in the Court of Appeals.

The Regents of the University of California is a corporation authorized by Article IX, Section 9(a) of the California Constitution. It has no parent and no subsidiary companies.

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IN THE SUPREME COURT OF THE UNITED STATES
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No. 95 - 1694

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

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ON WRIT OF CERTIORARI
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 9a-23a) is reported at 65 F.3d 771. The memorandum opinions and orders of the United States District Court for the Northern District of California (J.A. 24a-42a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1995. A petition for rehearing was denied on January 19, 1996. J.A. 43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a breach of contract claim brought by Respondent Doe against Petitioner, The Regents of the University of California.[1] The suit arises out of the University's activities in managing Lawrence Livermore National Laboratory, a federally-owned facility that the University operates pursuant to a contract with the United States Department of Energy ("DOE"). Doe alleges that the University breached a contract with him when it withdrew an

[1] For convenience, The Regents of the University of California generally is referred to as "the University" in this brief.

offer of employment at the Laboratory after Doe had accepted the offer. The District Court dismissed Doe's action against the University on the ground that the University is an instrumentality of the State of California, and that therefore the suit is barred by the Eleventh Amendment. The Ninth Circuit reversed. It held that the University is not entitled to be considered a State instrumentality "in this specific instance" because the agreement between the federal government and the University concerning the operation of the Laboratory obligates the federal government to indemnify the University for any liability arising out of the University's management of the Laboratory. J.A. 10a, 19a.

B. Factual Background.

Under Article IX, Section 9(a) of the California Constitution, The Regents of the University of California is a corporation with a governing board that consists of 18 members appointed by the Governor with the consent of the State Senate, and seven ex officio members including, *inter alia*, the Governor, the Lieutenant Governor, and the Speaker of the State Assembly. The University is viewed under State law as "a constitutionally created arm of the state," *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978), "a branch of the state itself," *Penington v. Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936), "a statewide administrative agency," *Ishimatsu v. Regents of the University of California*, 72 Cal. Rptr. 756, 762 (Cal. Ct. App. 1968), and "'a branch of government equal and coordinate with the Legislature, the judiciary, and the executive,'" J.A. 16a (quoting 30 Op. Cal. Att'y Gen. 162, 166 (1957)). *See also Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245, 257 (1934) (holding that the University "is a constitutional department or function of the state government").

The University is designated a "public trust" under Article IX, § 9(a) of the State constitution. Public support of the University "[f]rom all state revenues" is constitutionally required to be a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). The University is authorized to exercise the power of eminent domain, Cal. Educ. Code § 92439 (West 1989), and is exempt from both local taxation, *id.* § 92443, and local regulation, *Regents of the University of California v. City of Santa Monica*, 143 Cal. Rptr. at 279-80. Under California law, "[a]ll [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); *see also In re Bacon*, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966) (same); *Vaughn v. Regents of the Univ. of Calif.*, 504 F. Supp. 1349, 1354 (E.D. Cal. 1981) (same).

The Lawrence Livermore National Laboratory is a federal facility owned by the DOE.[2] The facility is managed and operated by the University pursuant to a contract with the DOE. Under the contract, the University handles all employment matters at the Laboratory, but the DOE retains control over the issuance of security clearances for Laboratory employees. J.A. 11a.

The contract provides that, subject to a number of qualifications, the DOE shall indemnify and hold the University harmless for any loss, judgment or liability "arising out of or connected with the work [under the contract]." J.A. 77a (University-DOE Contract, Art. XVII, cl. 4(b)). The contractual qualifications to DOE's obligation cover circumstances where the loss (1) is caused by "bad faith or

[2] Respondent originally named the Lawrence Livermore National Laboratory as a defendant entity in this suit but, on appeal, he correctly recognized that the Laboratory is not a legal entity but only a physical facility owned by the DOE. Appellant's C.A. Br. 5 n.2.

willful misconduct," (2) "would ultimately be an unallowable cost under the provisions of [the] contract," or (3) "results from a contractual commitment which when incurred exceed[s] the funds then obligated to the contract." *Id.* Furthermore, DOE's obligation to indemnify is expressly limited by "the availability of funds appropriated from time to time by Congress." J.A. 78a (Contract, Art. XVII, cl. 4(d)).

Respondent Doe, a citizen of New York, is a mathematical physicist who received his Ph.D. from Harvard University in 1981. He alleges that, in mid-June of 1991, he accepted an offer from the University for employment at the Lawrence Livermore National Laboratory. Doe further alleges that, shortly thereafter, the University attempted to withdraw the offer of employment on the ground that he would be unable to obtain the proper security clearance from the DOE.

C. Proceedings Below.

Doe filed this action on June 19, 1992, in the United States District Court for the Northern District of California. On February 5, 1993, the District Court issued a preliminary ruling dismissing certain of the claims against some of the defendants named in Doe's original and first amended complaints.[3]

On April 7, 1993, Doe filed a second amended complaint containing two claims. The first claim was against the University for alleged breach of an employment contract;

[3] Doe also originally named as defendants the DOE, James Watkins (then the Secretary of Energy), and Richard Claytor (then Assistant Secretary of Energy for Defense Programs). In November of 1992, Doe agreed to a stipulation by which all the federal defendants were dismissed from the case with prejudice. J.A. 25a n.4.

federal jurisdiction was premised on diversity of citizenship, 28 U.S.C. § 1332. The second claim was a claim under 42 U.S.C. § 1983 against the University and Petitioner Nuckolls for allegedly depriving Doe of his rights under federal security clearance regulations, which Doe claims were violated when allegedly "unqualified" personnel at the Laboratory "determined" his eligibility for a security clearance without regard to the procedures set forth in the regulations. *See* J.A. 12a. Jurisdiction over that claim was based on an asserted federal question, 28 U.S.C. § 1331. The two claims in Doe's second amended complaint define the current scope of the litigation.[4] Doe's complaint seeks, *inter alia,* money damages under the alleged employment contract in an amount exceeding $100,000 (the claimed amount of back pay is now much higher) and an order of specific performance requiring the University to hire Doe as a physicist according to the terms of the alleged employment contract.

On May 10, 1993, the University moved to dismiss most of the claims in Doe's second amended complaint, and the District Court granted the motion in all relevant respects on June 24, 1993. The court held that the University is an "arm of the State" for purposes of the Eleventh Amendment, and that Doe is therefore barred from pursuing the breach of contract claim in federal court. J.A. 35a-36a.

The court also dismissed the Section 1983 claim against the University and against Petitioner Nuckolls in his official capacity as Director of the Laboratory. J.A. 33a-35a. The court noted that, under *Will v. Michigan Department of State Police*, 491 U.S. 58, 70-71 (1989), governmental entities

[4] Doe's second amended complaint also requested that the District Court certify a class on behalf of all others similarly situated. The District Court did not act on the class certification request. *See* J.A. 33a.

considered "arms of the state" for Eleventh Amendment purposes, and officials of such entities (when sued in their official capacity), are not "persons" within the meaning of Section 1983, and thus are not subject to Section 1983 liability. J.A. 33a-35a. Accordingly, the Section 1983 claims against the University and Petitioner Nuckolls in his official capacity were dismissed. J.A. 36a.[5] On September 13, 1993, the District Court entered a final, appealable judgment on two of Doe's claims: (1) the breach of contract claim against the University, and (2) the Section 1983 claim against Nuckolls in his official capacity. J.A. 42a. Doe filed a timely appeal to the Ninth Circuit.

A divided panel of the Ninth Circuit reversed. The majority employed a five-factor test to determine "whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court." J.A. 14a. The court considered:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

J.A. 15a (quoting *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)).

The Ninth Circuit had previously ruled that the University was entitled to Eleventh Amendment immunity, *see Thompson*

[5] Doe's Section 1983 claim against Nuckolls in his individual capacity remains pending in the District Court. *See* J.A. 29a.

v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Eng'g v. Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988); *cert. denied*, 489 U.S. 1090 (1989), and application of the last four of the five factors, which depend on the general structure and function of the University, was unchanged since these prior rulings. The court, however, distinguished its prior authority on the basis of the first factor. The majority ruled that application of the first factor depended on the "source of funding in each situation," J.A. 18a, and thus the University could be an arm of the State in some circumstances, but not in others, *see id.* The majority determined that the first factor weighed against recognizing Eleventh Amendment immunity because the University-DOE "[c]ontract makes clear that the [DOE], and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." J.A. 15a

On that basis, the court held that the University, in its capacity as manager of the Laboratory, was not an arm of the State for purposes of the Eleventh Amendment. J.A. 18a. Because the University was not considered part of the State, it was subject to the court's diversity jurisdiction on Doe's contract claim. Also, for the same reason, neither it nor its officials were protected by the rule in *Will*, and, accordingly, were subject to suit under Section 1983.

Judge Canby dissented. In his view, the prior case law establishing that the University was a State instrumentality (*Thompson*, *supra*; *BV Engineering*, *supra*) should have been controlling, and the court should not "reassess the status of the University in the absence of a change in its structure." J.A. 20a.

Judge Canby recognized that the majority's decision turned on the first factor of its five-part test, *see id.*, but in his view that "factor must be viewed as a legal, not an economic

matter." *Id.* at 21a. To Judge Canby, the crucial issue was whether the State treasury is legally obligated and, he noted, "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California." *Id.* Accordingly, Judge Canby argued that the University's contractual right to seek indemnity from the United States should be irrelevant to the analysis:

> A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. On that basis, Judge Canby concluded that the University should be considered part of the State for purposes of the Eleventh Amendment, and that the University's officials would therefore also be immune from Section 1983 official capacity suits under the rule in *Will*.

The University and Petitioner Nuckolls filed a petition for rehearing and a suggestion for rehearing *en banc*, both of which were denied by the Ninth Circuit on January 19, 1996. J.A. 43a-44a.

SUMMARY OF ARGUMENT

The Court of Appeals acknowledged its prior decisions holding that the University is a State entity entitled to Eleventh Amendment immunity. The Court of Appeals distinguished these decisions, and denied Eleventh Amendment immunity, solely on the basis of its determination that, "in this specific instance," a money judgment against the University most likely would be paid by the United States, pursuant to an indemnification agreement between the University and the

DOE. J.A. 18a. The Court of Appeals' decision is contrary to basic principles of Eleventh Amendment immunity.

By its terms, the Eleventh Amendment bars "*any* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." The constitutional text does not make an exception for suits in which a private party can identify a source of funding for a money judgment other than the State itself.

This Court has recognized that the Eleventh Amendment confers immunity from suit, not merely protection against the financial impact of a money judgment. "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). The Court of Appeals' ruling allows a State entity such as the University to be subjected to the coercive process of federal courts, so long as the court finds that a third party is likely to bear the cost of a money judgment. The Court of Appeals' decision thus conflicts with "[t]he very object and purpose of the eleventh amendment."

The Court of Appeals erred by focusing on the economic impact of a judgment rather than the legal liability of the State. This Court has repeatedly held that the Eleventh Amendment bars *all* suits by private parties against unconsenting States and State entities, without regard to the type of relief requested by the plaintiff. A judgment against the University would be a legal obligation of the State of California. For Eleventh Amendment purposes, the economic impact of the judgment is irrelevant.

The Court of Appeals' decision is also contrary to the law governing waiver of Eleventh Amendment immunity. Because

a State's constitutional interest in immunity encompasses not only whether it may be sued, but *where* it may be sued, a State does not waive Eleventh Amendment immunity by consenting to be sued in its own courts. Once a State has consented to suit in its own courts, allowing suits to be brought in federal court should not lead to any greater financial impact on the State. Consequently, the waiver rules make little sense if Eleventh Amendment immunity is concerned only with the financial impact of litigation against the State.

In addition, the Court of Appeals' decision is in tension with decisions of this Court holding that State entities were entitled to Eleventh Amendment immunity even though a money judgment would be paid partially with federal funds. If the Court of Appeals' position were correct, this Court should have inquired further in those cases to determine the extent of Eleventh Amendment immunity.

The Court of Appeals' approach would require federal courts to engage in burdensome mini-trials in order to decide the threshold issue of Eleventh Amendment immunity. These fact-intensive proceedings, in which the court would attempt to predict the financial impact of a particular suit, would entangle the federal courts in a web of difficult ancillary issues. The court would be required to evaluate the legal merits of the State's claim against a third party, as well as practical obstacles to obtaining indemnification or reimbursement. The court would face a variety of other difficult issues, including whether a judgment would impose administrative costs on the State, and whether partial payment by a third party affects Eleventh Amendment immunity. Because the Court of Appeals' approach focuses on the financial impact of a particular judgment, a ruling in one case that a State entity is entitled to Eleventh Amendment immunity would not prevent relitigation of the Eleventh Amendment

issue in a subsequent suit against the same entity. In addition, a federal court's conclusion that a State should be reimbursed by a third party would have no *res judicata* effect on the third party, and thus could provide no certainty of indemnification.

Finally, the Court of Appeals' focus on financial impact could lead to perverse results. In this case, the DOE's indemnification obligation does not extend to acts of bad faith or willful misconduct by the University or its officials. Under the Court of Appeals' approach, a district court would be required to rule on these issues in order to decide the threshold immunity issue, and would be required to withhold immunity if it finds that the University did *not* engage in misconduct.

None of these consequences will be faced if the decision below is reversed and the University held entitled to immunity from suit in accordance with the intent and meaning of the Eleventh Amendment.

ARGUMENT

ELEVENTH AMENDMENT IMMUNITY DOES NOT DEPEND ON WHETHER A STATE ENTITY HAS A CLAIM FOR REIMBURSEMENT OR INDEMNIFICATION AGAINST A THIRD PARTY

The Court of Appeals acknowledged its prior decisions, holding that the University of California is a State entity entitled to Eleventh Amendment immunity. *See* J.A. 17a (citing *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *BV Eng'g v. Univ. of Calif., Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*,

489 U.S. 1090 (1989)).[6] The panel majority distinguished these precedents solely on the basis of its determination that, "in this specific instance," a money judgment against the University would most likely not have to be paid out of the State treasury, but instead would probably be paid by the federal government pursuant to an indemnification agreement with the University. *Id.* at 18a.

The panel majority's decision conflicts with decisions of other courts of appeals. For example, in *Cannon v. University*

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[6] The courts of appeals are virtually unanimous in holding that State universities are entitled to Eleventh Amendment immunity. *See Mascheroni v. Board of Regents of Univ. of Calif.*, 28 F.3d 1554, 1559 (10th Cir. 1994); *Hutsell v. Sayre*, 5 F.3d 996, 999 (6th Cir. 1993) (University of Kentucky); *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 3 F.3d 1482, 1485 (11th Cir. 1993); *Kaimowitz v. Board of Trustees, Univ. of Illinois*, 951 F.2d 765, 767 (7th Cir. 1991); *Dube v. State Univ. of New York*, 900 F.2d 587, 594 (2d Cir. 1990); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 116 (4th Cir. 1988) (Radford University); *Estate of Ritter by Ritter v. University of Mich.*, 851 F.2d 846, 851 (6th Cir. 1988); *Hall v. Medical Coll. of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 558 (5th Cir. Unit A 1982); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1350 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983); *Jagnandan v. Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977) (Mississippi State University); *Prebble v. Brodrick*, 535 F.2d 605, 610 (10th Cir. 1976) (University of Wyoming); *Long v. Richardson*, 525 F.2d 74, 76 (6th Cir. 1975) (Memphis State University); *Soni v. Board of Trustees of the Univ. of Tenn.*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Brennan v. University of Kansas*, 451 F.2d 1287, 1290-91 (10th Cir. 1971). *Walstad v. University of Minnesota Hosps.*, 442 F.2d 634, 641-42 (8th Cir. 1971). In the only court of appeals decision holding a State university not to be generally a part of the State, the court based its decision on the history of Rutgers University as a private institution and the degree of structural independence that the university retained. *See Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1312 (3d Cir. 1987).

of Health Sciences, 710 F.2d 351 (7th Cir. 1983), the Seventh Circuit held that Southern Illinois University and the Board of Trustees of the University of Illinois were entitled to Eleventh Amendment immunity because both universities are "recognized as state agencies under Illinois law." *Id.* at 356. The court rejected the argument that its Eleventh Amendment analysis should be "altered by the possibility that a damage award would be met through insurance proceeds or from federal funds." *Id.* at 357. Rather, the court held that the universities were entitled to Eleventh Amendment immunity because any judgment in the case would be "chargeable to university assets." *Id.*. Similarly, the Fifth Circuit in *Cronen v. Texas Department of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), rejected the argument that a State or State agency could be sued if the federal government would ultimately bear the entire cost of the judgment. Following the principles set forth in this Court's Eleventh Amendment decisions, the court concluded that "the source of the damages is irrelevant when the suit is against the state itself or a state agency." *Id.*[7]

The analysis of the courts in *Cannon* and *Cronen* is correct: Eleventh Amendment immunity that otherwise would be available to a State or State entity should not be compromised merely because the entity has taken steps to

[7] Other circuits have followed the approach of the panel majority, and based Eleventh Amendment immunity on a prediction of the likely financial impact of a particular judgment against a State entity. *See, e.g., Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir.), *cert. denied*, 459 U.S. 1150 (1981) (allowing suit against State entity based on a determination that the entity could recoup sums attributable to damage awards); *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) (allowing recovery to the extent that the State will receive reimbursement for a damages award). The split among the circuits is discussed at greater length in the University's petition for certiorari. *See* Pet. 9-21.

protect itself from the financial consequences of a money judgment. Regardless of whether the State entity may be entitled to indemnification for the costs of a judgment, the coercive process of the federal courts still runs against the State entity. That basic fact implicates the Eleventh Amendment, for, as this Court stated in *In re Ayers*, 123 U.S. 443, 505 (1887), "[t]he very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."[8]

A. The Eleventh Amendment Confers Immunity From Suit, Not Merely Protection Against The Financial Impact Of A Money Judgment.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[8] The question presented in this case would arise even if Eleventh Amendment immunity were limited to diversity cases. *Cf. Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 148 (1993) (Blackmun, J., concurring) (adhering to his view that the Eleventh Amendment preserves a State's immunity from suit only "in the limited context of an action by a citizen of another State or of a foreign country on a state-law cause of action," but nevertheless concluding that "a claim of immunity under the Eleventh Amendment should be appealable immediately"). Respondent Doe, who is a citizen of New York, has invoked the federal courts' diversity jurisdiction and asserted a state-law claim for breach of contract against the University. *See* J.A. 46a, 50a.

By its terms, the Amendment provides that the States are not subject to suit in federal court by citizens of another State. The language of the Eleventh Amendment does not provide that a citizen of another State may sue a State in federal court so long as a third party will bear the ultimate financial consequences of a money judgment. To the contrary, the Eleventh Amendment expressly bars "*any* suit in law or equity" against the States. (Emphasis added.) As this Court recognized in *Cory v. White*, 457 U.S. 85, 90-91 (1982):

> It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself merely because no money judgment is sought. . . . [T]he Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

The panel majority held, without textual support in the Amendment, that an arm of the State such as the University can be sued in federal court whenever the court can identify a "source of funding" for a money judgment other than the State treasury. J.A. 18a. Yet, when an arm of the State is sued, the action is "against one of the United States," no matter what source of funding may ultimately satisfy a judgment, and thus the Eleventh Amendment immunity applies.

This conclusion is confirmed by this Court's Eleventh Amendment decisions, which have recognized for more than a century that the Eleventh Amendment confirms a "presupposition" of our constitutional structure. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996), quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775,

779 (1991). *See also Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472 (1987) (plurality opinion); *Pennhurst Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Hans v. Louisiana*, 134 U.S. 1 (1890). "That presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that '"[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."'" *Seminole Tribe*, 116 S. Ct. at 1122, quoting *Hans*, 134 U.S. at 13, quoting, in turn, *The Federalist* No. 81 at 487 (C. Rossiter ed. 1961) (A. Hamilton).[9] Accordingly, the Court has repeatedly held "that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe*, 116 S. Ct. at 1122 & n.7, quoting *Hans*, 134 U.S. at 15 and collecting cases.

It follows that the Eleventh Amendment confers on the States a true immunity from suit in federal court, not merely protection from the financial effects of money judgments. The Court recognized this principle in *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* ("*PRASA*"), 506 U.S. 139 (1993), which held that a district court order denying a claim by a State entity to Eleventh Amendment immunity is immediately appealable under the collateral order doctrine of

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[9] Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity . . . it will remain with the States.

The Federalist No. 81 at 487-88 (C. Rossiter ed. 1961) (A. Hamilton).

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). The Court concluded in *PRASA* that the "same rationale" that supports an immediate appeal from denials of an official's claim of absolute or qualified immunity applies to claims of Eleventh Amendment immunity: "'The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" 506 U.S. at 144, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The Court's opinion in *PRASA* noted that the Eleventh Amendment, by withdrawing jurisdiction from federal courts to decide suits brought against unconsenting States, "effectively confers an immunity from suit." *Id.* (citing cases). The Court concluded that, "[o]nce it is established that a State and its 'arms' are, in effect, immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied." *Id.* In particular, "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Id.*

The Court's decision in *PRASA* expressly rejected the contention that "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability." *Id.* The Court explained that a narrow view of the Eleventh Amendment, as conferring only a defense to liability, "misunderstands the role of the Amendment in our system of federalism: '[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 146, quoting *In re Ayers*, 123 U.S. at 505. Thus, while an immediate appeal from the denial of an Eleventh Amendment immunity claim "is justified in part by

a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146.[10]

The Court reaffirmed the importance of the States' dignitary interests last Term in *Seminole Tribe*, where it rested its decision on the principle that the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" 116 S. Ct. at 1124, quoting *PRASA*, 506 U.S. at 146.

The importance of the States' dignitary interests is confirmed by the Court's analysis in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), which considered the applicability of the Eleventh Amendment to a bistate agency established under the Compact Clause. The Court began its analysis in *Hess* by considering the States' dignitary interests and the accompanying concerns of federalism. The Court first satisfied itself that "[b]istate entities occupy a significantly different position in our federal system than do the States themselves," 115 S. Ct. at 400, and that a "[s]uit in federal court is [neither] an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States," *id.* at 401. *See also id.* at 404 (determining, as first step of analysis, that it is not "disrespectful to one State to call upon the Compact Clause

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[10] If the Court of Appeals' approach to Eleventh Amendment immunity were correct, it is difficult to see why denial of a claim of Eleventh Amendment immunity should be immediately appealable. Under the Court of Appeals' view, the fact that a State or State entity is required to undergo a trial should not matter, so long as the State is not ultimately required to pay a money judgment.

entity to answer complaints in federal court").[11] Only after concluding that Compact Clause entities are significantly different from States for Eleventh Amendment purposes did the Court proceed to consider "the vulnerability of the State's purse," *id.*, as a factor in determining whether the Compact Clause entity was entitled to Eleventh Amendment immunity.

The Court of Appeals' decision disregards the States' dignitary interests. The panel majority held, in effect, that an unconsenting State entity such as the University of California may be sued in federal court whenever a private plaintiff can establish that the State entity will not have to bear the cost of a money judgment. Under the Court of Appeals' ruling, the Eleventh Amendment does not protect a State entity from the indignity of being subjected to the coercive process of a judicial tribunal at the instance of a private party, including the obligation to respond to the complaint, provide discovery, defend at trial, and comply with the federal court's judgment. Under the Court's analysis, the State entity is subject to such suits even on state law claims. The panel majority's decision thus is incompatible with the basic principle that the Eleventh Amendment provides States and State entities with immunity from suit.

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[11] As the Court recognized in *Hess*, 115 S. Ct. at 401-02, and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979), Compact Clause entities — which are formed by two or more States and not accountable to the people of any one State — do not fit comfortably within the text of the Eleventh Amendment, which prohibits suits in federal court "against one of the United States." That textual consideration clearly supports immunity in this case, because the University was created as a branch of the State government by the California Constitution, and is accountable solely to the people of that State.

B. Eleventh Amendment Immunity Turns On Whether A State Entity Is Being Subjected To The Coercive Process Of The Federal Courts, Not On Whether A Monetary Award Will Have A Financial Impact On The State.

As Judge Canby noted in dissent, "[n]o one has disputed that "a judgment against the University of California is a legal obligation of the State of California." J.A. 21a. Accordingly, "[a] judgment in this case will be a legal liability of the State." *Id.* As Judge Canby explained,

> The fact that California has a legal means of collecting an indemnity from the United States does not affect its liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Id. Moreover, Doe is seeking, in addition to back pay, an order requiring the University to employ him. J.A. 52a. Such an order would have to be carried out by the University itself even if the federal government paid an award of damages.

The Court of Appeals did not take issue with Judge Canby's conclusion that the State will be legally liable for any judgment entered against it. Instead, it concluded that the relevant inquiry for Eleventh Amendment purposes is whether the judgment will have a sufficient economic impact on the State. *See* J.A. 18a ("the source of funding in each situation . . . must be examined closely"). This approach is contrary to the principle that the Eleventh Amendment bars private parties from bringing *any* suit against unconsenting State entities in federal court, no matter what form of relief the plaintiff seeks.

The Court has repeatedly recognized this principle. In *Cory v. White*, as noted above (*supra* p. 16), the Court expressly rejected the view that the Eleventh Amendment immunity applies only to "suits 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" 457 U.S. at 90, quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). In *Pennhurst*, 465 U.S. at 100, the Court stated that, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment . . . regardless of the nature of the relief sought." Most recently, in *Seminole Tribe*, the Court stated: "[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 116 S. Ct. at 1124, citing *Cory v. White*, 457 U.S. at 90.

The Court's decisions concerning the scope of Eleventh Amendment immunity are consistent with "'[t]he general rule . . . that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, *or* interfere with the public administration," *or* if the effect of the judgment would be "to restrain the Government from acting, *or* to compel it to act."'" *Pennhurst*, 465 U.S. at 101 n.11, quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (emphasis added; citations omitted). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Brown v. General Services Admin.*, 425 U.S. 820, 826-27 (1963). In this case, Doe seeks an order compelling the University to employ him, as well as a money judgment. *See* J.A. 52a.

It is true that suits against State *officials* can be brought in federal court under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), so long as they seek prospective relief for violations of federal law. *See Edelman*, 415 U.S. at 664;

Pennhurst, 465 U.S. at 106. But as the Court explained in *PRASA*, the *Ex parte Young* exception to Eleventh Amendment immunity "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." 506 U.S. at 146, citing *Cory v. White*, 457 U.S. 85. The Court explained:

> Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

506 U.S. at 146.

Even under the *Ex parte Young* exception, moreover, the financial impact of a suit on the State treasury is not necessarily determinative. The distinction between prospective and retrospective relief recognized in *Edelman* rests on the view that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Pennhurst*, 465 U.S. at 102). As the Court observed in *Edelman*, "fiscal consequences to state treasuries" may be "the necessary result of compliance with decrees which by their terms [are] prospective in nature"; even "[t]he injunction issued in *Ex parte Young* was not totally without effect on the State's revenues," and later decisions have authorized relief that probably had an even "greater impact on state treasuries." 415 U.S. at 667, 668. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (holding that the Eleventh Amendment did not bar a federal court from ordering Arizona and Pennsylvania officials to grant welfare benefits to otherwise qualified applicants who were aliens, even though injunction

would require expenditure of large sums of money from the States' treasuries); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (rejecting an Eleventh Amendment challenge to a school desegregation order that required Michigan to expend substantial amounts of money from the State treasury to implement aspects of a school desegregation plan).[12]

The foregoing shows that financial impact on the State has not been the sole touchstone of Eleventh Amendment immunity, and thus the Court of Appeals got the wrong answer because it asked the wrong question. For Eleventh Amendment purposes, the relevant question is not whether the State or a State entity will ultimately bear the cost of a money judgment. Rather, the relevant question is whether the coercive process of the federal courts will operate against the State.

C. Making Eleventh Amendment Immunity Turn On The Financial Impact Of A Money Judgment Is Inconsistent With The Law Governing Waiver Of Immunity By The State.

The Court of Appeals' decision is also contrary to the law governing waiver of Eleventh Amendment immunity. This Court has long held that a State may waive its Eleventh Amendment immunity by consenting to be sued in federal court. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883).

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[12] Lower courts have held that a State's decision to indemnify its officers does not prevent a plaintiff from suing the officer in federal court under the doctrine of *Ex parte Young*. *See* J.A. 22a (citing *Blaylock v. Schwinden*, 862 F.2d 1352, 1353-54 (9th Cir. 1988); *Demery v. Kupperman*, 735 F.2d 1139, 1147-48 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985)). As Judge Canby recognized, this is a further indication that "[t]he question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought." *Id.* at 22a.

Because "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights," a federal court will find a waiver of Eleventh Amendment immunity "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). In particular, "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99 (emphasis in original). Accordingly, a State does not waive Eleventh Amendment immunity merely by consenting to be sued in its own courts. *Id.* at 99 n.9.

The distinction between a State's waiver of sovereign immunity from suit in its own courts and a waiver of Eleventh Amendment immunity from suit in federal courts makes little sense if Eleventh Amendment immunity is concerned only with the financial impact of litigation against the State. Once a State has consented to suit in its own courts, suit in federal court should not lead to any greater financial impact on the State's treasury, given that the same substantive law is applied in both fora.

The rules concerning waiver of Eleventh Amendment immunity make sense because the Eleventh Amendment encompasses a *jurisdictional* rule that protects the State's dignitary interests in being held accountable only in courts of its own creation. *See Seminole Tribe of Florida*, 116 S. Ct. at 1127; *Pennhurst*, 465 U.S. at 116-17 (Eleventh Amendment doctrine is grounded in the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other"). Thus, Eleventh Amendment waiver principles reinforce the conclusion that the Court of Appeals' approach is incorrect.

D. The Court Of Appeals' Decision Is In Tension With Decisions of This Court Holding That State Entities Are Entitled To Eleventh Amendment Immunity Even Though Federal Funds Would Satisfy Part Of The Judgment.

The Court of Appeals' decision is also in tension with decisions of this Court holding that State entities were entitled to Eleventh Amendment immunity even though a money judgment would be paid partially with federal funds. In *Edelman*, the plaintiffs challenged Illinois officials' administration of the federal Aid to the Aged, Blind, and Disabled (AABD) program. In its statement of facts, the Court recognized that the AABD program was funded in part by the federal government. 415 U.S. at 653. In rejecting an argument that Illinois had constructively consented to suit in federal court by agreeing to administer federal funds in compliance with federal law, the Court said:

> The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.

Id. at 673. If the Court of Appeals' approach to Eleventh Amendment immunity were correct, this Court in *Edelman* should have inquired further to determine whether a judgment would be paid wholly or partly out of federal funds. *Cf. Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir.), *cert. denied*, 492 U.S. 920 (1989) (ordering an accounting so that the District Court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United States"); *Robinson v. Block*, 869 F.2d 202, 214 n.11 (3d Cir. 1989) (same).

This Court followed its *Edelman* line of analysis in *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981) (per curiam). There the Court rejected an argument that Florida's agreement to comply with federal law in its administration of federal Medicaid benefits to nursing homes constituted a waiver of Eleventh Amendment immunity. *Id.* at 148-49. As in *Edelman*, the Court found that there was no waiver, and held that the Eleventh Amendment barred suit even though the federal government would pay a substantial portion of any judgment.

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the plaintiff sought retroactive relief in the form of payments under the Rehabilitation Act of 1973 from a State hospital that was the recipient of federal grants. Again, the Court held that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Id.* at 246-47. Again, the Court did not find it relevant to inquire whether any judgment would be paid out of federal funds.

Although these cases involved partial rather than full federal funding, some courts of appeals have correctly recognized that even 100 per cent federal funding of benefits (as in the Food Stamp program) does not affect Eleventh Amendment immunity. *See, e.g., Cronen v. Texas Dept. of Human Servs.*, 977 F.2d 934, 938 (5th Cir. 1992) ("source of the damages is irrelevant when the suit is against the state itself or a state agency"); *Cotton v. Mansour*, 863 F.2d 1241, 1245-46 (6th Cir. 1988) (rejecting, as "inconsistent with Supreme Court precedent," district court's holding that "if the [food] stamps themselves were paid by the federal

government, the state could not claim eleventh amendment protection").[13]

E. Federal Courts Should Not Engage In Extensive Case-By-Case Inquiries Into A State Entity's Finances To Decide Claims Of Eleventh Amendment Immunity.

The position advocated by Judge Canby in dissent, and adopted by other courts of appeals, *see, e.g., Cannon v. University of Health Sciences*, 710 F.2d 351, 356-57 (7th Cir. 1983); *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), allows the Eleventh Amendment to function as a true immunity from suit: If a State entity is sued in federal court, it can file a motion to dismiss, and the court can evaluate the claim of immunity as a matter of law. If the entity has previously been determined, under controlling circuit authority, to be part of the State, the case is dismissed. If that determination has not yet been made, the court will evaluate whether the entity is part of the State government. That determination, however, will not be specific to the facts of any one case and, once made, should be binding in future

[13] This Court's decisions concerning State taxation of contractors that conduct business with the federal government are relevant by analogy. In *United States v. New Mexico*, 455 U.S. 720 (1982), the Court held that private contractors managing nuclear design laboratories owned by the federal government are independent taxable entities not subject to the federal government's immunity from State taxation. The Court drew a sharp distinction between the federal government and its contractors, concluding that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." Id. at 734. *See also United States v. California*, 507 U.S. 746 (1993); *United States v. Boyd*, 378 U.S. 39 (1964). The federal government's obligation to indemnify its contractors neither expands federal immunity from taxation nor contracts Eleventh Amendment immunity.

cases unless there is a change in the entity's basic position within the State government. *See* J.A. 20a-21a (Canby, J., dissenting) ("Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play [in determining immunity] should be put to rest.").

In contrast, the rule adopted by the majority below — that a State entity may lose its Eleventh Amendment immunity in a particular case depending on a prediction about the ultimate financial impact of the suit — provides no true immunity from suit. A plaintiff will frequently (perhaps always) be able to sue a State entity in federal court and demand burdensome discovery directed to the entity's sources of funding and the likely financial impact of a judgment. To maintain its Eleventh Amendment immunity, a State entity will be required to undergo a fact-intensive mini-trial in which the district court will attempt to predict the ultimate financial impact of the suit. All State entities will be subject to this sort of mini-trial, even entities (such as the University) that courts previously have held to be a part of the State for Eleventh Amendment purposes. The State entity often will be required to disclose detailed information about its internal finances and financial arrangements with third parties before the court can rule on an Eleventh Amendment immunity claim.

The difficulties with this case-specific approach were recognized by Judge Canby in his dissenting opinion below. He warned that the majority's decision raises the specter of "a judicial exercise that has no natural boundary." J.A. 22a (Canby, J., dissenting). As Judge Canby observed:

> In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is

> far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

Id. Judge Canby's dissent aptly summarizes a range of possible complications bound to arise in pretrial proceedings that attempt to determine the ultimate financial impact of a particular suit. If State entities can always be subjected to such proceedings, they have no real immunity from suit in federal court.

Other courts of appeals have recognized the practical difficulties that would be created by tying Eleventh Amendment immunity to a prediction of the ultimate financial impact of the judgment. In *Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), for example, the Seventh Circuit refused to inquire into the ultimate source of funds used by a State entity to satisfy a judgment because, among other reasons, it would require courts "to engage in a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state.'" *Id.* In *Doucette v. Ives*, 947 F.2d 21, 29 (1st Cir. 1991), the First Circuit also noted that, in circuits where a reimbursement exception to Eleventh Amendment has been recognized, district courts are required to conduct "a fact-specific inquiry" concerning the impact of judgment. Such factual inquires are inconsistent with the basic purpose of the Eleventh Amendment, which is to provide a threshold immunity from suit. *See PRASA*, 506

U.S. at 147 (adjudication of Eleventh Amendment immunity should not "implicate[] any extraordinary factual difficulty").

As Judge Canby's dissent suggests, even after a federal court engages in an intrusive inquiry into the entity's finances, it may be far from certain whether a particular judgment will have an impact on the State treasury. The court often would be required to weigh the legal merits of the State's claim against a third party, including potential defenses available to the third party. In this case, for example, even through the University has entered into a "relatively clear" indemnity agreement, (J.A. 22a), the DOE's contractual obligation to indemnify the University is limited by several express qualifications, the scope of which may be disputed by the government, and the obligation is also subject to "the availability of funds appropriated from time to time by Congress." J.A. 78a (Contract, Art. XVII, cl. 4(d)). In many cases, the district court would also be required to consider whether a legally valid claim against a third party might not be paid (because, for example, the third party may become insolvent).

Even if it appears that the State has a valid claim against a third party and the third party is likely to pay the judgment, it may be difficult to determine whether the judgment will nevertheless have a financial impact on the State. For example, even if the federal government or another third party pays 100 percent of the face amount of the judgment, the judgment may impose administrative costs on the State. *Compare Cotton v. Mansour*, 863 F.2d at 1245-47 (holding that the Eleventh Amendment prohibited retroactive relief even though the federal government would pay 100 per cent of the judgment, because the State would bear some administrative costs) and *Colbeth v. Wilson*, 554 F. Supp. 539, 544-46 (D. Vt. 1982) (same), *aff'd*, 707 F.2d 57 (2d Cir. 1983) (*per curiam*) *with Foggs v. Block*, 722 F.2d 933, 941 n.6 (1st Cir.

1983) (holding that administrative costs are irrelevant to Eleventh Amendment analysis because they "should be de minimis"), *rev'd on other grounds sub nom. Atkins v. Parker*, 472 U.S. 115 (1985).

In addition, the timing of payment may impose a cost on the State. If there are delays in obtaining payment from a third party, the State may be required to pay the judgment with funds from its treasury, and may be unable to recoup interest on the money it pays out. *See Doucette*, 947 F.2d at 29.[14]

An additional layer of complexity arises in cases in which a third party is likely to pay some, but not all, of a judgment. In such cases, the logic of the Ninth Circuit's approach might require federal courts to adopt a "pro rata" approach to Eleventh Amendment immunity, based on the court's prediction of the percentage of the judgment that would be paid by the third party. *See Bennett v. White*, 865 F.2d at 1408 (ordering an accounting so that the district court could impose retroactive relief against the State Department of Public Welfare "at least to the extent that DPW will be reimbursed by the United States"); *Robinson v. Block*, 869 F.2d at 214 n.11 (3d Cir. 1989) (same). *Compare Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982), *aff'd on other grounds sub nom. Chardon v. Fumero Soto*, 462 U.S. 650 (1983) (declining to create an exception to Eleventh Amendment immunity where federal and State funds are "intermingled").

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[14] Judgments may impose other costs on the State. For example, if a third party is required to indemnify the State pursuant to a contractual agreement, the expected cost of such awards is likely to be a factor in future contract negotiations between the State and the third party.

The difficulties federal courts inevitably would encounter in predicting the financial impact of particular judgments are illustrated by the court of appeals' treatment of cases in which a judgment against a State entity would be covered by an insurance policy. Several courts of appeals have concluded that State entities would be required to pay higher insurance premiums if they were subjected to a suit for damages in federal court, and therefore have held that the insured status of a State entity does not destroy Eleventh Amendment immunity. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 945 (1st Cir. 1989) (Tourism Company of Puerto Rico entitled to Eleventh Amendment immunity even though "any judgment against the Tourism Company would be paid by its insurance carriers"); *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) (State entitled to Eleventh Amendment immunity even if it has liability insurance that will pay the judgment). Although the prediction of higher insurance premiums may hold true in some cases, in other cases the effect is not as clear. If the State has waived sovereign immunity, the State entity will be subject to suit in State court even if the Eleventh Amendment bars a suit in federal court. *See Dupont Plaza Hotel*, 888 F.2d at 944-45 (State subject to suit in State court under "sue and be sued" provision of its statutory charter). *See generally Florida Nursing Home Ass'n*, 450 U.S. at 149-50 ("sue and be sued" clause authorizes suits in State, but not federal, courts). State entities may purchase third-party liability insurance precisely *because* the State has waived sovereign immunity from suit in its own courts. Thus, under the panel majority's approach, an inquiry would be required as to the possible effects on future premiums of federal court judgments against State entities.

In short, requiring federal courts to make fact-intensive determinations concerning sources of funding for judgments against States could quickly entangle them in a web of difficult

ancillary issues. Not only would this burden the federal courts, but it would also impose the prospect of unending litigation for State entities. The Court of Appeals' test requires examination of whether the State entity is entitled to Eleventh Amendment immunity in each "specific instance." J.A. 18a. Given the ingenuity of lawyers in arguing that one specific instance differs from another, a ruling in one case that an entity is an arm of the State would rarely prevent relitigation of that issue in subsequent cases.

One of the exceptions in the University-DOE contract illustrates the perverse implications of the Court of Appeals' ruling. Under Article XVII, cl. 4(b), the DOE's indemnity obligation does not extend to circumstances where the University or its officials are guilty of "bad faith or willful misconduct." J.A. 77a; *see also* J.A. 82a (DOE will bear the cost of any judgment "absent clear and convincing evidence of bad faith or willful misconduct"). Although the University would certainly deny that there has been any bad faith or willful misconduct on its part in this case, it makes no sense for a trial court to determine in advance whether such misconduct occurred in order to rule on the University's threshold claim to immunity. In addition, it is perverse to withhold immunity *because* the University did not engage in misconduct. That, however, is the effect of the Court of Appeals' holding. For, if this were a case involving willful misconduct, the University would be liable for the costs of the judgment and, under the reasoning of the Court of Appeals, the Eleventh Amendment would apply.

A final procedural objection to the majority ruling below is presented by the limitations of *res judicata*: While a court may hold in the primary liability case that the State *should* be reimbursed by the federal government (or a private insurer), that ruling provides no guarantee to the State entity that it *will* be reimbursed. The court's ruling is clearly not binding on

the federal government or on any other third party not represented in the case. Thus, the court's ruling would amount to no more than a prediction of the likely financial impact of the judgment that could provide no certainty for the State.

CONCLUSION

A State or State entity does not forfeit Eleventh Amendment immunity merely because it has a claim for indemnification or reimbursement against the federal government or another third party. The Court of Appeals' decision is contrary to the text of the Eleventh Amendment and is fundamentally incompatible with this Court's Eleventh Amendment decisions, which have recognized that the Amendment confers an immunity from suit that does not depend on whether the plaintiff is seeking a money judgment. The Court of Appeals' approach would require federal courts to undertake a burdensome case-by-case inquiry into the finances of State entities in order to decide threshold claims of Eleventh Amendment immunity.

Because the University's indemnification agreement does not compromise its Eleventh Amendment immunity, Respondent's claims against the University must be dismissed. In addition, because suits against State officials in their official capacity are not suits against "persons" for purposes of § 1983, all claims against Petitioner Nuckolls in his official capacity seeking retrospective relief must be dismissed. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989).[15]

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[15] The Court of Appeals' ruling that the Section 1983 claim against Petitioner Nuckolls could go forward was based entirely on its conclusion (J.A. 19a) that the University is not protected by Eleventh Amendment

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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immunity "in this particular instance." Accordingly, if the Court holds that the University is entitled to Eleventh Amendment protection, the Court of Appeals' ruling on the Section 1983 claim against Nuckolls must also be reversed. Doe's Section 1983 claim against Nuckolls is not based on an allegation of an ongoing violation of federal law, and thus is barred under *Edelman* and *Papasan* v. *Allain*, 478 U.S. 265, 279 (1986).

No. 95-1694

In The

Supreme Court of the United States

October Term, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Petitioners,

v.

JOHN DOE, Ph.D., and all others similarly situated,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(Respondents disagree with Petitioners' statement of the questions presented.)

1. Whether the Eleventh Amendment applies to the unique facts of this case, in which the United States Department of Energy will *pay directly* – not merely reimburse later – any damages awarded against the Regents of the University of California (as manager of the Lawrence Livermore National Laboratory).

2. Whether this case, with its unique factual setting, is a proper vehicle for resolving any conflicts that may exist among circuits in cases with distinctly different factual settings involving reimbursement, insurance, or the actual impact of judgments on state treasuries.

3. Whether, in an action under 42 U.S.C. § 1983, federal court protection of federal civil rights relating to federal security clearance procedures should be sacrificed to simplify Eleventh Amendment jurisprudence.

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STATEMENT OF THE CASE

Respondents strongly disagree with Petitioners' characterization of this case as a "contract action" (Brief for Petitioners ("BFP") at 2). This is primarily a federal civil rights action under 42 U.S.C. § 1983 for violation of Plaintiffs' rights secured by the due process clause of the Fourteenth Amendment and DOE security clearance procedural regulations. Plaintiff Doe, a mathematical physicist, alleges that after he had accepted the offer of employment at the Lawrence Livermore National Laboratory ("LLNL"), the LLNL attempted to withdraw the offer and refused to employ him in any position. The LLNL did so because its personnel determined that Doe could not obtain a security clearance from the DOE in any period of time, reasonable or otherwise (Second Amended Complaint, ¶ 10, Joint Appendix ("J.A.") at 48a). Plaintiffs further allege that federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR), provide that only the DOE may determine eligibility for a DOE security clearance, not any other entity such as the LLNL or its employees (*id.*, ¶ 11, J.A. at 48a).

Plaintiffs also allege that the LLNL, Nuckolls, and the University of California have an ongoing and continuing policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of the foregoing federal law (*id.*, ¶ 13, J.A. at 48a).

In addition to his civil rights claim, Plaintiff Doe also alleged a diversity breach of contract claim, since he resides in New York (*id.*, ¶¶ 18, 19, and 4, J.A. at 50a, 50a, and 46a). However, the foundation of this action is the violation of federal civil rights, proof of which would entitle Plaintiffs to judgment, even if the Regents Corporation successfully withdrew its offer of employment to Doe. (Federal jurisdiction over

the breach of contract claim is also provided by 28 U.S.C. § 1367(a) on supplemental jurisdiction.)

SUMMARY OF THE ARGUMENT

Petitioners have no immunity to lose. The threshold issue in this case is whether the Regents of the University of California ("Regents Corporation") is, in general, an "arm of the state" for Eleventh Amendment purposes.[1] Such a conclusion should not be assumed, especially since this "Court has never decided whether any particular state university is an arm of the State for Eleventh Amendment purposes" (Solicitor General's Brief at 14). The true question presented here is "[w]hether the Eleventh Amendment applies to the unique facts of this case, in which the United States Department of Energy will pay directly – not merely reimburse later – any damages awarded against the Regents of the University of California" (Respondents' Brief in Opposition at i). It is not, as Petitioners contend, "whether an entity, which otherwise would be considered . . . an "arm of the State" . . . may lose its immunity where it has a claim for reimbursement or indemnity", since this is not a reimbursement case and Petitioners have no immunity to lose.[2]

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[1] Respondents refer to Petitioner as the "Regents Corporation" because, in the instant case, it is performing a commercial or "proprietary" function in managing the Lawrence Livermore National Laboratory ("LLNL") for the U.S. Department of Energy ("DOE"), rather than its usual function of providing higher education by managing the University of California. As a result, is it misleading to refer to Petitioners as the "University".

[2] Respondents necessarily contend that cases holding to the contrary, such as *BV Engineering v. University of California*, 858 F.2d 1394 (9th Cir. 1988) and *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) were wrongly decided, largely because the issues in those cases were waiver, consent, and Congressional abrogation rather than the applicability of the Eleventh Amendment itself, or the determination was made simplistically, as in *Mascheroni v. Board of Regents of the Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994).

Respondents propose a three factor test to determine Eleventh Amendment immunity, combining the "state treasury" and "state control" factors from the majority and dissenting opinions in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394 (1994) and adding a "function" factor so that entities are not granted immunity when they are not performing a state governmental function. *Doe v. LLNL*, 65 F.3d 771, 775 (9th Cir. 1995) (J.A. at 17a). The factors discussed in *Hess*, which involved a bi-state entity, are applicable to all Eleventh Amendment cases because there is "no reason to vary the analysis for interstate and intrastate entities". *Hess*, 115 S.Ct. at 409 (O'Connor, J., dissenting). Respondents also propose district court procedures that will honor a state's dignitary interest by precluding invasive discovery and using motions to dismiss to determine immunity while still protecting the constitutional rights of individuals.

Application of the "state treasury" factor reveals that the Eleventh Amendment does not even apply to this lawsuit because no judgment rendered herein can have the slightest impact – even temporarily – on the treasury of the State of California. That is because of the unusual treatment of the Regents Corporation by state law, and especially because the Contract between the Regents and the DOE provides that the DOE will "pay directly" any judgment against the Regents (J.A. at 77a). Since the Regents Corporation is responsible for paying judgments rendered against it from its own treasury and the resources of the state are not pledged to pay such judgments, then an impact upon the state treasury is precluded. *Durning v. Citibank*, 950 F.2d 1419, 1424 (9th Cir. 1991), followed in *Doe v. LLNL*, 65 F.3d at 774 (J.A. at 15a) and *Bolden v. Southeastern Pennsylvania Trans. Auth.*, 953 F.2d 807, 815 (3d Cir. 1991).[3] This Court has held that only "a suit by private parties seeking to impose a liability which ***must*** be paid from public funds in the state treasury is barred by the

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[3] *Bolden* was cited with approval as to the importance of the state treasury factor in *Hess*, 115 S.Ct. at 404.

Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (emp. added).

Application of the "state control" factor demonstrates that the Regents Corporation is independent of any significant control by the elected branches of the state government, according to Article IX, section 9 of the State Constitution, its Government Code (especially section 965.9, excluding only the Regents among all other state entities as to payment of judgments), and decisions of the California Supreme Court. *Estate of Royer*, 123 Cal. 615, 624 (1899), followed in *Regents of the University of California v. Superior Court (Regan)*, 17 Cal.3d 533, 536 (1976), holding that the "university . . . is not clothed with the sovereignty of the state and is not the sovereign".

Fairness to both private persons and corporations requires that Eleventh Amendment immunity be granted only when a defendant is performing a state governmental function rather than a commercial (or "proprietary") function, especially a revenue-generating function performed for the federal government. Otherwise, public corporations such as the Regents will enjoy an unfair competitive advantage in their business transactions. *In re Holoholo*, 512 F.Supp. 889, 901-02 (D. Hawaii 1981), a decision which the Regents herein never appealed. While the Ninth Circuit below said that it "look[ed] at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory", *Doe v. LLNL*, 75 F.3d at 774 (J.A. at 15a), it actually – and correctly – decided to the contrary, concluding that "[t]he University is an enormous entity which ***functions*** in various capacities and which is not entitled to Eleventh Amendment immunity for all of its ***functions***." *Id.*, at 775, J.A. at 17a (emp. added).

Since this case presents a federal security clearance issue, the national security should not be sacrificed merely to extend Eleventh Amendment immunity to an entity that does not even enjoy sovereign immunity under state law. Finally, Respondents submit that because of the unique facts of this case, including the unusual treatment of the Regents Corporation by state law and especially the "pay directly" provision in the Contract between the Regents and the DOE, it presents a poor vehicle for deciding Eleventh Amendment questions.

ARGUMENT

I. The Eleventh Amendment Does Not Apply To This Litigation, Since Any Award Of Damages Against Petitioners-Regents Would Have No Impact Upon California's Treasury But Would Be Paid Directly And In Full By The United States Doe Under Its Contract With The Regents Corporation.

Petitioners manage the LLNL for the DOE under a "Contract between the United States of America and the Regents of the University of California (For the Management and Operation of the Lawrence Livermore National Laboratory), Contract No. W-7405-ENG-48, Modification No. M205" dated November 20, 1992. Article XVII of this Contract, "Litigation, Claims and Indemnification" (J.A. at 67a), provides in general that the DOE and *not* the Regents Corporation will pay *directly* any money judgment rendered against the Regents in performing the Contract, including attorney's fees and costs (Contract pages 154-160, J.A. at 67a-78a). As a result, the State of California has no liability whatsoever for anything arising out of the operation of the LLNL, including the alleged breach of its employment contract with Plaintiff Doe herein. The Ninth Circuit below "conclude[d] that this factor weighs against granting the University Eleventh Amendment immunity from suit in federal court", *Doe v. LLNL*, 65 F.3d 771, 774 (9th Cir. 1995) (J.A. at 15a), because the Contract's Article XVII, CL. 4, "General Indemnity (Special)", subdivision (c), at 160 (J.A. at 77a) makes clear that any judgment rendered herein against the Regents Corporation would be paid fully and directly by the United States Department of Energy.

The following facts are not susceptible to reasonable dispute:

(1) Only damages payable by the DOE are sought against the Regents Corporation (prospective injunctive relief is sought only against official-capacity defendants under 42 U.S.C. § 1983) (Second Amended Complaint, Relief (5) & (7) (J.A. at 52a);

(2) The DOE will pay directly any judgment rendered against the Regents; and,

> (3) Any money paid to Plaintiff Doe in this lawsuit will never be in the treasury of the State of California.

Over fifty years ago, this Court held that a judgment "to be satisfied out of any fund in the state treasury" is barred by the Eleventh Amendment. *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 463 (1945) (internal quotation marks omitted). Citing *Ford Motor* with approval about thirty years later, this Court firmly established that "a suit by private parties seeking to impose a liability which ***must*** be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663 (emp. added), followed in *Quern v. Jordan*, 440 U.S. 332, 337 (1979). More recently, this Court emphasized the importance of this factor in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 404 (1994):

> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that ***must*** be paid out of a State's treasury. . . . Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations [emp. added, citing cases from the first, third, fifth and seventh circuits].

In the instant case, the Ninth Circuit agreed. After setting forth its "five-factor analysis" (J.A. at 15a):

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only in the name of the state, and [5] the corporate status of the entity.[,]

that Court concluded that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state" (J.A. at 15a). While most of Petitioners' authorities do not describe their analyses in terms of "factors", all which involve money damages appear to rely

heavily if not solely upon the source of payment, and most follow *Edelman v. Jordan*, 415 U.S. 651 (1974), often citing page 663 or 665.[4] Therefore, the Eleventh Amendment applies only when a state's treasury is a source of funds to pay all or part of a money judgment.

While it is true that *Edelman*, 415 U.S. at 673 observes that "[t]he mere fact that a state participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts", the public aid there "was funded by the State and the Federal Governments." *Id.*, at 653. In the instant case, there is not even the potential for state funding of the LLNL.

In other factual settings, the Ninth Circuit has held that the Regents Corporation was entitled to Eleventh Amendment immunity (see indented quotation, *post*). However, the unique facts of this case – the Regents' management of a nuclear research facility for the federal government, which will pay directly any judgment rendered against the Regents Corporation – indicate that the result herein should differ from the results in other cases. In those cases, assuming *arguendo* that they were decided correctly, the Regents Corporation was performing its governmental function of providing higher education and had to pay any judgment from its own funds. The Ninth Circuit correctly distinguished all relevant precedents. *Doe v. LLNL*, 65 F.3d at 775 (J.A. at 17a, emp. added):

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[4] See, e.g., *Bennett v. White*, 865 F.2d 1395, 1405, 1407-08 (3d Cir. 1989); *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), cert. den., 459 U.S. 1150 (1983); *Cannon v. Univ. of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983); *Doucette v. Ives*, 947 F.2d 21, 30 (1st Cir. 1991); *Esparza v. Valdez*, 862 F.2d 788, 794-95 (10th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 942-45 (1st Cir. 1989); *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir. 1991); *Lujan v. Regents of the University of Cal.*, 69 F.3d 1511, 1522-23 (10th Cir. 1995); and *Paschal v. Jackson*, 936 F.2d 940, 942-44 (7th Cir. 1991), cert. den., 502 U.S. 1081 (1992).

> It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934);[5] *Thompson [v. City of Los Angeles]*, 885 F.2d 1439 (9th Cir. 1989; *B.V. Eng'g [v. University of California]*, 858 F.2d 1394, 1395 (9th Cir. 1988) (citing *Jackson [v. Hayakawa]*, 682 F.2d 1344, 1350 (9th Cir. 1982); *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981). However, previous grants of immunity in contexts where the State of California is financially responsible for the University do **not automatically** translate into immunity in this **unique** situation.

In the instant case, the excerpts from the Contract between the Regents Corporation and the U.S. Department of Energy (J.A. at 67a-79a) clearly show – as the Ninth Circuit dissent concedes (J.A. at 22a: "a relatively clear indemnity agreement") – that the DOE and *not* the Regents Corporation is liable for any judgment rendered against the Regents in performing the Contract, and that the DOE will pay *directly* such judgment as well as all costs of litigation, including attorney's fees. Specifically, Article XVII of this Contract, "Litigation, Claims and Indemnification", CL. 4, "General Indemnity (Special)" at 160 (J.A. at 77a), provides that:

> (b) . . . the Government shall indemnify and hold the University harmless against any delay, failure, loss or damage, judgment or liability . . . and any expenses in connection therewith (including costs of damages, costs and expense of litigation and claims) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any

[5] *Hamilton* is **not** an Eleventh Amendment case. It is a state court case in which the U.S. Supreme Court reviewed a decision of the California Supreme Court (293 U.S. at 250).

> alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work. . . .

Petitioners repeatedly use words like reimburse(ment) and recoup (BFP at 11, 12, 26, 30, 32, 34, and 35) and speculate about who "will bear the ultimate financial consequences of a money judgment" (BFP at 16; see also at 14 – "ultimately bear the entire cost of the judgment"), erroneously suggesting a scenario in which the Department of Energy reimburses the Regents Corporation *after* it pays damages in a lawsuit. They go as far as to speculate about the effects of delays, suggesting that a state "may be unable to recoup interest on the money it pays out" (BFP at 32).[6] Not unexpectedly, Petitioners rely heavily upon Judge Canby's dissent in the Ninth Circuit (BFP at 22, 30, and 31), but even he conceded that "[i]n this case, there is a relatively clear indemnity agreement" (BFP at 30, quoting from J.A. at 22a). Judge Canby also refers to eventual recoupment (BFP at 30, quoting from J.A. at 22a – "eventually to recoup the judgment").

However, the Contract expressly goes beyond mere reimbursement or recoupment. Subdivision (c) of the above Article provides that (J.A. at 77a, emp. added):

> (c) The Government shall **pay directly** and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and, when requested by the University, all claims which may be settled by agreement and approved by the Contracting Officer.

Clearly, "pay directly" means that the federal government pays in the beginning, not "in the end", as Judge Canby argues in his dissent (J.A. at 22a). Indeed, the Solicitor General ("SG") has explained that money to pay any judgment rendered herein has *already* been deposited by the U.S. Department of Energy in a

[6] The Solicitor General's admission that "[t]he government's contractual obligation to pay for judgments against DOE contractors has historically been subject to 'very narrow, and infrequently invoked, conditions' " (SG's Brief at 4) makes Petitioners' speculation about uncertainty of DOE payments sheer conjecture.

"special bank account in which United States Treasury funds are deposited" under an "advanced funding" mechanism (SG's Brief at 4). Since this lawsuit cannot have any impact – even temporarily – on the treasury of the State of California, the Regents Corporation is not entitled to Eleventh Amendment immunity in this unique case. This result was expressly confirmed by the Department of Energy on November 23, 1993.[7]

Respondents submit that the foregoing speculation should be rejected. Ninth Circuit authority, for example, does not permit such speculation. *ITSI TV Productions v. Agricultural Associations and the California Exposition & State Fair*, 3 F.3d 1289, 1293 n. 3 (9th Cir. 1993) ("*Durning* [*v. Citibank*, 950 F.2d 1419 (9th Cir. 1991)] makes clear that the mere possibility that state funds might be used to pay a judgment is of no independent significance"). Indeed, this Court's own precedents make clear that Eleventh Amendment immunity is appropriate when a "a suit by private parties seek[s] to impose a liability which ***must*** be paid from public funds in the state treasury." *Edelman*, 415 U.S. at 663 (emp. added), followed in *Quern*, 440 U.S. at 337.[8] Worse yet, the Solicitor General proposes further conjecture regarding the impact of a "proposed amendment" to the Department of Energy Acquisition Regulation involving "prudent business judgment" (SG's Brief at 24). Since the relevant "legal liability" here is the contractual obligation of the Department of Energy to "pay directly"

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[7] On November 23, 1993, the San Francisco Operations Office of the United States Department of Energy issued a statement to Plaintiff Doe confirming subdivision (c), above, stating that "absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director [Defendant Nuckolls], the Department [of Energy] will bear the cost of defending the University [of California] and the Laboratory [the LLNL], and of any monetary judgment in your favor which may be rendered by the courts." (Statement at page 2, J.A. at 82a.)

[8] *Edelman* also states that "[t]he funds to satisfy the award in this case **must inevitably** come from the general revenues of the State of Illinois" (415 U.S. at 665, emp. added). Here, any funds paid to Plaintiffs will both initially and eventually be paid directly by the U.S. Department of Energy, not by the Regents Corporation nor the State of California.

any judgment rendered herein, Petitioners' argument on this point must be rejected.

In the instant case, the Panel's majority correctly "look[ed] behind the pleadings"[9] by examining the Contract between the Regents Corporation and the Department of Energy and deciding that "the Department, and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." *Doe v. LLNL*, 65 F.3d at 774 (J.A. at 15a). Contrary to Petitioners' assertions, the court below did not qualify its holding with "most likely" and "probably" when addressing the payment of a judgment by the federal government. (BFP at 13, citing J.A. at 18a.)

In addition, Respondents submit that a distinction should be made between the treasury of the entity in question and that of the state itself. The Ninth Circuit below stated the issue as:

> [W]hether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation.

Doe v. LLNL, 65 F.3d at 774, J.A. at 15a (internal quotation marks omitted). The Third Circuit agreed in *Bolden v. Southeastern Pennsylvania Trans. Auth.*, 953 F.2d 807, 815 (3d Cir. 1991):

> Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or power to satisfy the judgment.

This distinction makes sense because it seeks to preserve the dignitary interest of the state itself by not "subjecting a State to the coercive process of judicial tribunal at the instance of private parties." *Seminole Tribe of Florida v. Florida*, ___ U.S.

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[9] See *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987)

___, 116 S.Ct. 1114, 1124, citing *Hess* and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139 (1993). Here, there is not even a temporary impact on either the Regents' treasury or the State's treasury, since the U.S. Department of Energy will pay directly any judgment rendered against the Regents Corporation.[10]

Finally, the Regents Corporation's "Campus Financial Schedules, 1991-1992" reveal that, unlike funds from other sources, all funds received for the "Department of Energy Laboratories" are totally "restricted" ("University Programs and Administration" at 195 and 205).[11] Only about $12.9 million out of $2.4 billion are categorized as "unrestricted, designated" (at 195), and that amount appears to be the fee paid to the Regents Corporation for managing the Laboratories.[12] All "expenditures" related to the Laboratories are totally – 100% – restricted. Clearly, the Regents Corporation is not free to use funds for the Laboratories for any other purpose. These schedules also reveal that no funds from any source other than the Department of Energy are expended by the Laboratories. That is, the Regents Corporation serves as a conduit for over $2 billion from the federal government to

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[10] According to the Solicitor General's Brief, this payment has already been provided for by the "advanced funding" mechanism described at 4 ("[t]he contractor pays its expenses by drawing on the account, while the federal government retains ownership of the account balance") and at 21 n. 16 therein. This mechanism avoids any problem posed by the Anti-Deficiency Act discussed by this Court in *Hercules Inc. v. United States*, ___ U.S. ___, 116 S.Ct. 981, 987-88 (1996) and relied upon by *amicus curiae* National Conference of State Legislatures, et alia at 4 and 14.

[11] See Appendix to "Appellants' Response to Defendants-Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc", selected pages from "Campus Financial Schedules, 1991-1992" (Docket Sheet Entry 10/25/95, J.A. at 2a).

[12] The Regents' total budget is $7.4 billion for the University plus $2.4 billion for the LLNL. (Campus Financial Schedules at 208 in Appendix A to "Defendants-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc*" (Docket Sheet Entry 9/25/95, J.A. at 2a)).

scientists and other technical professionals who perform research for the Department of Energy. If Petitioners have their way, it would "pay automatic homage to . . . abracadabra whenever the state is an unwilling party to legal action" and would "abandon reason for obeisance." *In re Holoholo*, 512 F.Supp. 889, 907 n. 29 (D. Hawaii 1981). Therefore, Petitioners' general argument regarding possible payment of any judgment herein from funds of the State of California must be rejected.

The foregoing financial details show that the legal liability of the State of California is not an issue. However, the dissenting judge in the Ninth Circuit below observed that "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California" (Joint Appendix at 21a), but the fact is that up to this moment, no one involved in this litigation ever addressed this issue directly. Rather, Respondents took the position that the Eleventh Amendment does not apply hereto because of the unique "pay directly" provision in the Contract between the Regents Corporation and the Department of Energy (Respondents' Brief in Opposition at i, and J.A. at 77a) and the Ninth Circuit's majority agreed (J.A. at 18a).

In response to the Solicitor General's pointed argument (SG's Brief at 18, 19 and 21), we briefly address the "legal liability" issue. In an attempt to defend the Department of Energy against liability, the Solicitor General baldly asserts that the legal obligation to pay any judgment rendered herein lies with the University (SG's Brief at 18):

> Despite that provision [to pay directly], however, the University remains subject to suit and any judgment rendered in such a suit will be rendered against the University, which will be responsible for its satisfaction.

Repeating this point, the Solicitor General argues that "the University will be legally responsible to Doe for that judgment" (SG's Brief at 19), but utterly fails to address the liability of the State itself, even in concluding remarks (SG's Brief at 21 n. 16):

> Whether the University first must pay a judgment from its own funds and then seek reimbursement from DOE or is entitled to require DOE directly to satisfy the judgment is a matter solely between the University and DOE and does not change the status of the judgment as a legal liability of the University owed to Doe.

The issue here is the impact of a judgment on the treasury of the state itself, but neither Petitioners nor the Solicitor General have established such an impact in the instant case. Their argument is circular, amounting to nothing more than an assumption, based on the dissent by Judge Canby below (SG's Brief at 19), that the Regents Corporation is an arm of the state, a point that was never conceded by Respondents. Moreover, the "advance funding" mechanism described by the Solicitor General (SG's Brief at 4) as well as the restrictions found in the Campus Financial Schedules[13] preclude any impact of a judgment on the state treasury. That is true even if one assumes that the Regents will conspire with the DOE in bad faith to frustrate Plaintiff Doe's efforts to collect a judgment.[14] If, however, the distinction between the Regents' treasury and that of the State of California cannot be made, then Plaintiff Doe's remedy of last resort for a failure of the Department of Energy to honor its obligation to "pay [a judgment] directly" would lie in the U.S. Court of Federal Claims, where he would move for summary judgment against the DOE based on a judgment

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[13] See Appendix to "Appellants' Response to Defendants-Appellees' Petition for Rehearing and Suggestion for Rehearing *En Banc*" (Docket Sheet Entry 10/25/95, J.A. at 2a).

[14] Respondents are troubled by *amicis*' repeated arguments, used to bolster the Regents' sagging claim of immunity, which suggest that a federal agency and the Regents will act in *bad faith* to frustrate Plaintiff Doe, or that insolvency or bankruptcy may occur. (See, e.g, the SG's Brief at 7 and 18-21, and the National Conference of State Legislatures' Brief at 2, 4, 10, 12-13, 14, and 15.) Amici would have this Court assume that powerful federal officials are likely to break written promises just to prevail on a legal issue against a relatively powerless individual, who now appears before this Court *in forma pauperis*.

rendered herein in his favor. (See Solicitor General's Brief at 23 n. 17.) Under no circumstances can there be an impact of a judgment herein on the treasury of the State of California.

The analytical, fact-based approach of the Ninth Circuit Panel's majority, including its heavy reliance upon the lack of "state liability for [a] money judgment" (*Doe*, 65 F.3d at 774, J.A. at 15a), is supported by a recent decision of this Court. In *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 397 & 406 (1994), this Court denied Eleventh Amendment immunity based on that factor. In reaching its conclusion, this Court discussed "the Eleventh Amendment's twin reasons for being" – the State's dignitary interest and the impact of a money judgment on the state's treasury. *Id.*, 115 S.Ct. at 407. This Court next quoted approvingly (at 405) from the Brief for the States:

> In sum, as New York and New Jersey concede, the "vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight."

The dissent in *Hess*, 115 S.Ct. at 408, succinctly summarized the majority's holding:

> [F]or determining arm-of-the-state status, we may now substitute a single overriding criterion, vulnerability of the state treasury. If a State does not fund judgments against an entity, that entity is not within the ambit of the Eleventh Amendment, and suits in federal court may proceed unimpeded. By the Court's [majority] reckoning, the state treasury is not implicated ***on these facts***. Neither, it follows, is the Eleventh Amendment. [emp. added]

Since the decision of the panel's majority herein is in accord with a recent decision of this Court, the judgment of the Ninth Circuit below should be affirmed.

The dissent in *Hess* emphasizes the "control" and "oversight" exercised by the State over the entity in question in determining Eleventh Amendment immunity (*id.*, 115 S.Ct. at 411), but even that test would not protect the Regents Corporation on the facts presented here. (See Part III, *post* at 32-42, for

a detailed discussion of how California state law treats the Regents.) In the instant case, it is the United States Department of Energy, acting through officials whose employment it has approved and whose salaries it pays, that exercises control and oversight over the LLNL. Therefore, under any test discussed in *Hess*, the Regents Corporation would not be "cloaked with the Eleventh Amendment immunity that a State enjoys". *Hess*, 115 S.Ct. at 397. The framers of this Amendment could never have intended the result urged by Petitioners and the dissent in the Ninth Circuit. (See *Hess*, 115 S.Ct. at 400 for a discussion of Eleventh Amendment history.)

II. To Determine Whether A State Entity Enjoys Eleventh Amendment Immunity, Respondents Suggest Adding A Third Factor To The State Treasury And Control Factors Used In *Hess*, In Order To Avoid An Absolutist Approach That Would Unduly Expand Or Contract States' Rights In Our Federal System.

A. This Court Should Hesitate to Increase the Scope of the Eleventh Amendment Without a Sound Basis in Fact and Law.

Interest in a state entity's entitlement to Eleventh Amendment immunity has recently intensified because this Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). Since *Seminole* pertains only to the power of Congress to abrogate a state's immunity as a state (rather than a state entity), it does not apply to the instant case. Thoughtless expansion of such immunity to all State entities, whether independent entities or true "arms", could easily lead to injustices. Such expansion could also lead to unaccountability, because states would be tempted to structure their entities to insulate them from liability in all suits that might be brought in federal courts. Respondents object to such a simplistic or "absolutist" test as proposed by Petitioners.

In general, a determination of Eleventh Amendment immunity should not be based solely upon one factor, such as the impact of a judgment on the state treasury or the control

exercised over an entity by the elected branches of state government. Nor can it be granted every time there is a theoretical legal liability of the state without an examination of at least the two factors discussed in *Hess*. (BFP at 10).[15] The variety of the functions performed by state entities and their increasing complexity preclude an absolutist or other simplistic approach. Since state entities are not states, all such entities should not be treated alike.

A "bright line" standard suggested by Petitioners would fly in the face of this Court's opinions in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1994), *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), and *Lincoln County v. Luning*, 133 U.S. 529 (1890). These decisions explain why the nature of the State entity [as opposed to the State itself] must be considered before Eleventh Amendment immunity is granted, focusing on such factors as "state treasury", "control", and state law treatment of the entity.

Determination of immunity in every Eleventh Amendment case should involve a measure of fact specific analysis that the Petitioners erroneously state is always coercive. To protect the dignitary interest, Petitioners would have immunity extend to *all* state entities simply because they are somehow affiliated with the State. But a similar extension was rejected by this Court in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979) (rejecting "an absolute rule" that would extend immunity to all state entities as an unacceptable "expansive reading of the Eleventh Amendment" (at 400)). On the other hand, courts could read the Eleventh Amendment literally and hold that it protects only states *qua* states.

Neither of these extreme approaches has been utilized by any Court. This Court, as well as lower Federal Courts, have used different analytical approaches to determine Eleventh Amendment immunity, granting immunity to some but not all

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[15] There is no such liability of the State of California herein, since any money judgment would name only the Regents Corporation as defendant. See, *In re Ayers*, 123 U.S. 443, 487 & 492 (1887).

state entities. A more judicious approach to "arm of the state" analysis should be based on a carefully-selected set of factors. Any approach that disregards the commercial (or "proprietary") nature of functions performed by a state entity or disregards funds outside of the state treasury or fails to consider the independence of the entity from state control will just not work. Requiring that public entities be analyzed by a three factor test will avoid future conflicts among the Circuits, and the proposed test would not impair a state's dignitary interest.[16] One rule cannot fit all.

B. "Absolutist" Cases – Those Decided Without Any Significant Analysis – Should Be Ignored.

In their treatment of the Regents Corporation, the Courts in *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (citing *Hamilton* in dictum), *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1559 (10th Cir. 1994) (citing *Jackson* and *Hamilton*), and *BV Engineering v. University of California*, 858 F.2d 1394, 1395 (9th Cir. 1988) (citing only *Jackson*) quickly concluded that the Eleventh Amendment applied to the Regents without performing any multi-factor analysis or otherwise inquiring into the nature of the corporate entity. Their conclusions were based almost solely upon *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

Petitioners and amici rely upon *Hamilton* (BFP at 3, 12; Solicitor General's Brief at 5, 14; and National Conference of State Legislatures' Brief at 25), implicitly suggesting that neither the five-factor analysis used by the Ninth Circuit below (J.A. at 15a) nor any other similar analysis should be applied to the Regents Corporation because *Hamilton* has already decided the threshold issue in this case. However, *Hamilton* was not an

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[16] Fact-based inquiries can be made less intrusive by limiting the procedures available in Federal Courts for determining Eleventh Amendment immunity. (These changes are discussed in more detail *post*, at 28-29.) Preservation of a state's dignitary interest should not result in manifest injustice.

Eleventh Amendment case. It was an "appeal under [superseded] § 237(a), Judicial Code, 28 U.S.C. § 344(a), from a judgment of the highest court of California sustaining a state law that requires students at its university to take a course in military science and tactics". *Id.*, at 250. The issue arguably relevant to the instant case was whether an order of the Regents was equivalent to a "statute of any state", since the Regents contended that this Court had "no jurisdiction". *Id.*, at 257. To find federal jurisdiction over the suspended students' constitutional claims (conscientious objection to military service), this Court broadly construed the language in question:

> The meaning of "statute of any state" is not limited to acts of state legislatures. . . . It follows that the order making military instruction compulsory is a statute of the state within the meaning of § 237(a) [of the Judicial Code].

Id., at 258. Having thus established federal jurisdiction, this Court held that the Regents' order did not "transgress[ ] any constitutional right" nor other federal law. *Id.*, at 265. There was no claim for money damages, and the Eleventh Amendment was not even mentioned! This Court simply rejected the Regents' "insist[ence] that this appeal should be dismissed for the want of a substantial federal question." *Id.*, at 258. Now, the Regents Corporation argues to the contrary, insisting not only that there is "state action", but so much so that it is an arm of the state. Respondents submit that federal jurisdiction over the Regents should be found here, because important federal questions under the Fourteenth Amendment (see *id.*, at 257) are also presented by the instant case.

No decision of this Court holds that the University of California or any other state university is an "arm of the state" for Eleventh Amendment purposes (SG's Brief at 14), so that it is unreasonable to assume without any factor analysis that the Regents Corporation is entitled to Eleventh Amendment immunity based solely or largely upon *Hamilton*. As shown in Part V, *post* at 47, an entity can be capable of "state action" under the Fourteenth Amendment without being an "arm of the state" under the Eleventh Amendment.

C. Future Circuit Conflicts Can Be Avoided By Using a Three Factor Test to Determine "Arm of the State" Status.

Consistency of future decisions requires that the same test be used for all determinations of Eleventh Amendment immunity. This can be accomplished by slightly expanding the two factors analyzed in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct 394, 404 (1994) – the "state treasury" and "state control" factors – and adding a third "function" factor (governmental vs. commercial (or "proprietary")).

1. *Expanded "State Treasury" Factor*

As the predominant factor, it requires an examination of the entity's funding to determine whether it is self-sufficient or otherwise financially independent of the state. As explained *post*, at 28-29, the burden would be on the plaintiff to obtain relevant evidence outside of the judicial process, without resorting to discovery except when the state government did not cooperate in furnishing public documents (such as the Contract herein between the Regents and the DOE). This expansion promotes uniformity of decisions by providing guidance to lower federal courts.

In the cases granting immunity, virtually all stated that the state treasury factor was the most important, but sometimes based their decisions on other factors and indicated doubt by qualifying their conclusions. See, e.g., *Watson v. University of Utah Medical Center*, 75 F.3d 569, 576-77 (10th Cir. 1996) (distinguished between the University itself and its related Medical Center, observing that "the funding issue makes this a close case" because less than five percent of the Medical Center's funding "comes from state appropriations") and *Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993) (finding that the university's "Board of Trustees does not operate independently of the central state government", "policy-making for the university is vested in the State Council on Higher Education", and university "finances . . . are considered state funds").

Expanded treasury factors were considered in at least two cases. In *Brown v. Porcher*, 660 F.2d, 1001, 1007 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1981), immunity was denied because "the [unemployment insurance] funds are special and the state [statute] has expressly protected general revenues from liability". In *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir. 1989), cert. denied, 492 U.S. 290 (1989), the state's payment of certain AFDC benefits would, to some extent, "be reimbursed by the United States." (Note, however, that reimbursement is **not** involved in the instant case.) These cases demonstrate the correct application of the state treasury factor by considering all relevant facts, thereby eschewing a simplistic analysis.

The pivotal point in all these cases was the state treasury factor. This is especially true in *Cannon v. University of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983), which held that "any damage award chargeable to university assets is an award against the State itself", so that "it is a virtual certainty [that any damage award will] be paid from state funds", citing *Edelman*, 415 U.S. at 668 (brackets by the court). (See BFP at 14.) Not one of these circuit court cases discussed the dignitary interest of the state; and, of course, no state entity of any kind has a dignitary interest of its own. (Following this Court's opinion in *Hess*, *Gray v. Laws*, 51 F.3d 426, 431-32 and 434 (4th Cir. 1996) discusses the dignitary interest at some length.)

2. *The State Control Factor*

Secondarily but almost equally, the degree of control by the state over the entity must be considered. In *Hess*, the dissent by Justice O'Connor focuses on this factor. "The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity." *Hess*, 115 S.Ct. at 411. "The inquiry should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins." *Ibid.* "If the State delegates control and oversight . . . , the requisite state-level control is lacking, and the Eleventh Amendment does not shield the entity from suit in federal court." *Ibid.* The more independent and self-sufficient the State entity, the less reason to grant Eleventh Amendment immunity. Using the factors

emphasized by the majority and dissenting opinions in *Hess* will promote consistent results in future cases.

The Fourth Circuit has applied the *Hess* analysis to a suit against a county health department – a single state (not bi-state) entity – in *Gray v. Laws*, 51 F.3d 426, 432 (4th Cir. 1995):

> [W]e believe that the same general principles identified in that opinion must also apply in the single state context. The two fundamental principles identified by the Court are the principal rationales for the Eleventh Amendment itself, *see, e.g., id.* at ___, 115 S.Ct. at 404 (identifying treasury and sovereignty concerns as "the Eleventh Amendment's twin reasons for being"), and therefore they should be no less applicable in the single state context. The [*Hess*] Court even distills these principles for cases addressing whether an entity within a single state could be characterized as an arm or alter ego of the state. [footnote 4]

Other decisions denying immunity were based on the – state treasury and control factors. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977) holds that "the answer [to the immunity question] depends, at least in part, upon the nature of the entity created by state law." On balance, this Court determined that the school board was "to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend". *Ibid.* The foregoing analysis clearly considers both the "state treasury" and "control" factors.

Ambus v. Granite Board of Education, 995 F.2d 992 (10th Cir. 1993) (en banc) was cited with approval *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1559 (10th Cir. 1994) as well as in *Watson*, 75 F.3d 569 at 574-75 (10th Cir. 1996), but *Mascheroni* opted for a simplistic or "absolutist" approach to find in favor of the Regents Corporation. Using factors derived from this Court's opinion in *Mt. Healthy*, 429 U.S. at 380, the lack of state control over local school boards was found to be paramount, "although the State Board regulates many aspects of the public school system".

Ambus, 995 F.2d at 995-96. "That some public funds might be implicated is not dispositive", *id.* at 996, citing *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 54 (1978). *Ambus*, 995 F.2d at 996. The court concluded that because "[a]n award in plaintiff's favor would therefore not run solely against the state, the suit was "not barred by the Eleventh Amendment." *Id.*, at 997.

Kovats v. Rutgers, the State University, 822 F.2d 1303 (3d Cir. 1987) is almost on all fours with the instant case. There, professors sued over denial of tenure under 42 U.S.C. § 1983, alleging violations of due process, equal protection, and freedom of speech. *Id.*, at 1305. Based on a nine-factor analysis deduced from this Court's opinions in *Mt. Healthy* and *Lake Country Estates* (*id.*, at 1307), immunity was denied. The court observed that although Rutgers is "a state created entity which serves a state purpose with a large degree of state financing, it remains under state law an independent entity able to direct its own actions and responsible for its own judgments resulting from those actions." *Id.*, at 1312.

Rutgers' situation is similar to that of the Regents Corporation. Like the Regents, Rutgers is an "independent entity" (*id.*, at 1312), although Rutgers is required to comply with all state laws and regulations (*id.*, at 1311), unlike the Regents. But in both cases state control is de minimis. *Id.*, at 1311 ("minimal state supervision and control"). "New Jersey has twice explicitly insulated itself from any liability on obligations running against Rutgers" (*id.*, at 1309); and, like the Regents, Rutgers is "unlike other New Jersey state agencies". *Ibid.* But unlike Rutgers, the Regents Corporation is not performing its usual governmental function of providing higher education but is involved in a commercial or "proprietary" operation for the Department of Energy. If Rutgers is not immune, *a fortiori* the Regents Corporation is not immune as to its operation of the LLNL.[17]

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[17] This is in contrast to the grant of immunity in *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). "The most crucial

The cases above and the bi-state compact cases briefly discussed below suggest that the control factor should not be ignored, particularly when the source of payment for any judgment will come from sources other than the State treasury itself. Lack of control – or independence of the entity from the state – usually occurs because the entity has the power to raise money, is a revenue producer, or there is some other outside payor. The more independent the state entity is from day to day control, the less the reasons for granting immunity.

The bi-state compact cases employ a virtually identical analysis. *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) denied immunity because funding "must be provided by the counties, not the States", TRPA was "a separate legal entity", its obligations were "not . . . binding on either State", and its rules were "not subject to veto at the state level". "Indeed, . . . TRPA is not in fact an arm of the State subject to its control". *Id.*, at 401-02. In *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 397 (1994), Eleventh Amendment immunity was denied based on the state treasury factor. *Id.*, at 404-406. In reaching its conclusion, this Court discussed "the Eleventh Amendment's twin reasons for being" – the state's dignitary interest and the impact of a money judgment upon the state's treasury. *Id.*, at 407. The conclusion was that neither state's treasury would be affected because of the entity's "history of paying its own way" and that it was "structured . . . to be self-sustaining". *Id.*, at 405.

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question is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." In granting immunity to the State College system, the court noted that, "[u]nlike the University of California, the California State University and Colleges are subject to full legislative control. . . . They have only such autonomy as the Legislature has seen fit to bestow." *Id.*, at 1350 (internal quotation marks omitted).

3. ***The Function Factor*** *– The Commercial v. Governmental Nature of the Entity's Function That Gives Rise to a Particular Lawsuit.*

A third but less important factor is the nature of the function performed by the entity that gives rise to a lawsuit. A blanket grant of immunity should not be given to any state entity for all of its activities. In the instant case, the Regents Corporation, under its Contract with the Department of Energy, is not engaging in a State governmental function (such as education). Rather, the function is commercial, it involves the exclusively federal domain of nuclear weapons research, and it is competitive with private institutions. (See *In re Holoholo*, quoted *post* at 26.) State universities and other public corporations that engage in competitive market enterprises should not enjoy the unfair advantage of Eleventh Amendment immunity, particularly when the enterprise does not involve a matter of state concern.

This factor must not be neglected because state entities have become less service oriented but more revenue producing and development oriented. "In recent years, the States have created a wide variety of entities to respond to the needs of their citizens, including community development, business development, housing finance and medical finance authorities." (National Conference of State Legislatures' Brief at 17.) *ITSI TV Productions v. Agricultural Associations and the California Exposition & State Fair*, 3 F.3d 1289, 1293 (9th Cir. 1993) was a copyright infringement suit wherein Cal Expo was denied immunity. The crucial facts were that "essentially all of its funds are derived from its own activities", and there was "no obligation on the part of the state to pay [its] debts". *Ibid.* In addition, the court observed that "in organizing state fairs and expositions . . . it [Cal Expo] thus can hardly be said to perform 'central governmental functions'." *Ibid.*

Closest to the instant case is *In re Holoholo*, 512 F.Supp. 889, 904 & n. 25 (D. Hawaii 1981), which did not grant immunity to the Regents of the University of California, in part because of the commercial or proprietary nature of the

work the Regents Corporation was doing. This was a case of wrongful death on the high seas which arose during the performance of a Contract between the Regents and the U.S. Department of Energy (almost identical to the Contract in the instant case). After review of the Contract, the Court observed (*id.*, 512 F.Supp. at 901):

> However, the complete picture is even more convincing. The state defendants sought, on a competitive basis, to enter contracts to conduct research, on a paid basis, in the interest of and on behalf of the United States. The contracts contain numerous examples of the involvement of the United States in the conduct of the research by the UC and the UH [Univ. of Hawaii]. In many instances, this amounts to complete control by the United States and/or the UC over certain aspects of the performance of the contracts by the UC and/or the UH.

By entering into a contract with the Federal government for a national security purpose (not a matter of state concern) and not performing its governmental function of education thereunder, the Regents Corporation was not and could not be granted immunity. This is virtually identical to the situation to the instant case.[18]

Since the entity's function in the instant case is commercial or proprietary in nature, the Department of Energy could have contracted with Stanford University or other private entities, which in fact it does for the management of other National Laboratories. For example, the DOE contracts with University of Chicago to manage the Argonne National Laboratory and with the Lockheed-Martin Corporation for the Sandia National Laboratories. It does not make sense for immunity to apply in one case and not the other, simply

[18] The *Holoholo* court decided against immunity based largely upon its conclusion that the UC had consented to suit in federal court under the terms of its commercial Contract with the DOE. *Id.*, at 906. The Regents never appealed this decision.

because one manager is a public corporation like the Regents and the other is a private corporation.

Such commercial enterprises are usually financially self-sufficient, *Lake Country Estates*, 440 U.S. 391, 402 (1979) (funding "must be provided by the counties not the States"), sometimes because they generate their own revenue. *Hess*, 115 S.Ct. 394, 399 (1994) ("[t]olls, fees, and investment income account for the Authority's secure financial position"). Examples of such enterprises where immunity was denied include building a bridge and operating ferries (*Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 280 (1959) ("the launching of a governmental corporation into an industrial or business field"), cited with approval in *Hess*, 115 S.Ct. at 402 n. 12), intellectual property transactions (*Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 935 (Fed. Cir. 1993) (infringement of a patent "owned by the University")), organizing state fairs and expositions (*ITSI TV*, 3 F.3d at 1293), and "a proprietary venture onto the navigable waters of the United States and the high seas" which involved "six planned voyages to an ocean thermal energy conversion . . . station" (*In re Holoholo*, 512 F.Supp. at 904 and 892, respectively). In general, when a public entity goes beyond its governmental function and engages in an activity that is purely commercial, and does so in competition with private corporations, it should not automatically be granted the immunity available to a state under the Eleventh Amendment. *Doe v. LLNL*, 65 F.3d at 775 (J.A. at 17a) ("[t]he University is an enormous entity . . . which is not entitled to Eleventh Amendment immunity for all of its functions").

As state entities continue to evolve, some of their functions have intruded into competitive areas where they are performing functions that private industry can do with equal efficiency.[19] More importantly, when an entity such as a

[19] Such evolution may result in an entity's change of Eleventh Amendment status. See, *Treleven v. Univ. of Minnesota*, 73 F.3d 816, 819 n. 3 (8th Cir. 1996) ("Treleven offered no evidence that the [financial]

university embarks on a commercial business activity that is not primarily concerned with the welfare of its own citizens but rather with exclusively federal matters like nuclear weapons research, it should not enjoy immunity for that activity based on the federal constitution.[20] The entity has become nothing more than just another participant in the free market, no different from a private entrepreneur (except for "state action" under the Fourteenth Amendment). In such an activity, it should not enjoy the competitive advantage of using Eleventh Amendment jurisdictional limitations as a shield to limit its exposure to litigation.

D. Simple Procedures Will Protect a State's Dignitary Interest Without Significantly Impairing an Individual's Rights Under Federal Law.

To minimize the burden on a state entity that is found to be an "arm of the state" while protecting the constitutional rights of plaintiffs, the following procedures should be followed at the earliest stages of litigation:

1. A defendant shall move to dismiss limited to Eleventh Amendment grounds within thirty days of service, before any discovery takes place and before any other motion is made. (A court may raise this issue *sua sponte* at any time, but should also do so without delay.)
2. If the motion to dismiss claims that a judgment will have an impact on the state treasury, the burden shall be on the *plaintiff* to prove otherwise if the defendant makes a minimal showing to support its claim. In general, the plaintiff shall be required to obtain relevant evidence from sources available to the public, such as from entities covered by a state's equivalent of the federal Freedom of Information Act. If a state entity does not cooperate fully in producing the requested documents, then limited discovery of the entity's finances, including the production of relevant documents, shall be allowed (and with motions to compel, if the entity resists or engages in delaying tactics).
3. If the district court grants immunity based on the state treasury or any other factor, then the case shall be dismissed without prejudice to the plaintiff's filing in state court, and the defendant shall be required to waive any statute of limitations that may have run while the case was in federal court. The district court may exercise its discretion under the existing Rule 54 to grant a stay while the plaintiff pursues an interlocutory appeal.

This approach will reduce litigants' costs, respect a state's dignitary interest, and avoid wasting scarce judicial resources. It will do so by precluding extensive fact gathering and burdensome mini-trials (see BFP at 11, 29), thereby reducing a court's temptation to resort to a simplistic or "absolutist" approach that usually leads to an unexplained (and often unfounded) grant of immunity.

E. Petitioners Cannot Seriously Raise the State's Dignitary Interest Because the Regents Corporation Voluntarily Has Accepted All Terms of Its Contract with the DOE and Has Freely Engaged in Discovery Unrelated to Immunity.

Petitioners' harping on the "coercive power" of the federal courts (BFP at 10, 15, 18-21, 24) has been rendered almost meaningless by the Regents' acceptance of myriad provisions of federal law in the commercial Contract with the Department of Energy. According to the Table of Contents, these provisions

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relationship between the University and the state has changed since our 1971 *Walstad* decision").

[20] DOE contractors "do not enjoy federal sovereign immunity" (Solicitor General's Brief at 3).

include regulations under the "FAR" (Federal Acquisition Regulation) and the "DEAR" (Department of Energy Acquisition Regulation) that only government contractors are subject to.[21]

In contracting with the Federal Government, the Regents Corporation has accepted the power of the Federal Government to control certain conduct of the state entity, including the federal government's demand that security clearance decisions be made only by the DOE and not the Regents. (Contract at 138, "Article XIII, CL. 1 – Security", docket sheet entry 59 (J.A. at 8a.))[22] As a result, the Regents Corporation cannot now use dignitary interests as the prime basis for immunity. While the Corporation may argue that its waiver is limited to nuclear events (Contract, Article XVII, CL. 2 – "Nuclear Hazards Indemnity Agreement", (e)(1) "Waiver of Defenses", J.A. at 72a-74a), this waiver alone diminishes the importance of the presumed dignitary interests. In addition to this express waiver, implied waivers arise from the provisions in the Contract relating to security clearances (*ante*) and, more importantly, to patent litigation (Contract, Article XII, "Intellectual Property" (J.A. at 8a – Docket Sheet Entry No. 59). *Holoholo*,

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[21] Legislative Lobbying Cost Prohibition (DEAR 970.5204-17, Utilization of Small and Disadvantaged Business Concerns (FAR 52.219-8), Utilization of Women-Owned Business (FAR 52.219-13), Equal Opportunity Preaward Clearance of Subcontracts (FAR 52.222-28), Foreign Ownership, Control, or Influence Over Subcontractors (DEAR 952.204-74), Anti-Kickback Act (FAR 52.203-7), Drug Free Workplace (FAR 52.223-6), Convict Labor (FAR 52.222-3), Equal Opportunity (FAR 52.222-26), Vietnam Veterans Affirmative Action (FAR 52.222-35), Affirmative Action for the Handicapped (FAR 52.222-36), Patent Indemnity (FAR 27.203), Classified Inventions (DEAR 970.2701(a)), Security (DEAR 952.204-2), Clean Air and Water (DEAR 52.223-2), and Nuclear Hazards Indemnification Agreement (DEAR 952.250-70).

[22] "(h) Security Clearance of Personnel. The University shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required."

512 F.Supp. at 901-02 ("[i]t is difficult . . . to imagine that the UC and the UH did not understand that by subjecting themselves to, among others, suits for patent infringement . . . would subject themselves to suit in federal court"). This accumulation of waivers, plus the fact that Petitioners freely submitted to discovery for almost one year regarding issues unrelated to immunity, amounts to a waiver of their dignitary interest.

It would be inequitable to allow a state entity to pick and choose the areas where it consents to suit in federal court, particularly when it is performing a commercial contract with a federal agency. The Ninth Circuit's decision below is limited to the specific terms of the Contract and does not subject the Regents Corporation to federal jurisdiction in all instances.

Concurring in *Hess*, 115 S.Ct. at 407, Justice Stevens explained that an expansive approach to Eleventh Amendment immunity can be "an engine of injustice", and that "throughout the doctrine's history, it has clashed with the just principle that there should be a remedy for every wrong." He added that "[s]overeign immunity inevitably places a lesser value on administering justice to the individual than on giving government a license to act arbitrarily". Accordingly, we should not only balance the *Hess* factors appropriately, but we should also balance the "dignitary interests" of a state against the dignity of the Constitutional rights of private and largely powerless individuals.

Applying the proposed three factor test to the instant case reveals that the "state treasury factor" clearly favors Respondents even without the "pay directly" provision in the Contract between the Regents and the DOE. Similarly, the "state control" factor also favors Respondents, since under state statutory and decisional law the Regents Corporation is not cloaked with the immunity of the sovereign. The "function" factor is also to the same effect. The LLNL is a facility for nuclear weapons research, a field restricted to the federal government. See, e.g., 42 U.S.C. § 2011, et seq. (atomic energy), including § 2021 (federal cooperation with states), 42 U.S.C. § 2014 (definitions, esp. (aa)), 42 U.S.C. § 2077 (requiring a federal license even to possess "special [weapons grade] nuclear material"),

and 18 U.S.C. § 831 (prohibited transactions involving nuclear materials). The Eleventh Amendment should not be used to shield a federal contractor from suit in federal court, especially in a case turning on a federal security clearance question arising in a federally-owned facility.

III. The Regents Corporation Is So Independent Of Control By The Legislative And Executive Branches Of The State Government That It Has An Arm's Length Relationship With The State.

Respondents will show that, under California statutes, its constitution, and state supreme court decisions spanning the last hundred years, the Regents Corporation is an independent entity affiliated with the state but free of any significant control by either of the elected (legislative and executive) branches of state government. See *Hess v. Port Authority Trans-Hudson*, 115 S.Ct. 394, 411 (1994) (dissenting opinion); see also *id.*, at 404 for the majority's discussion of control).[23]

Before addressing this issue, several words, often used loosely and interchangeably, must be defined. An "entity" is simply something that exists, and therefore is much broader than "arm", "agency" and "instrumentality", the latter two having identical meanings. "Arm", as used in Eleventh Amendment opinions, suggests something controlled by a higher power to which it is directly connected, analogous to a human brain's controlling the arms connected to its body, or a state's

[23] "An arm of the State, to my mind, is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the **electorate**. The critical inquiry, then, should be whether and to what extent the **elected** state government exercises oversight over the entity. If the lines of oversight are clear and substantial – for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings – then the entity should be deemed an arm of the State". *Hess*, 115 S.Ct. at 411 (emp. added). Respondents submit that neither the Legislature nor the Executive branch of the State of California exercises any such control over the Regents Corporation, especially as to its management of the LLNL for the United States Department of Energy.

governor controlling the activities of his or her subordinates. An entity may be a part of a state for establishing "state action" under 42 U.S.C. § 1983 and yet not be an arm or instrumentality thereof for Eleventh Amendment purposes. (See Part V, *post*, at 49.)

A. State Law Treats the Regents As an Independent Public Entity, Not As an Arm of the State.

The Regents Corporation is a public entity just as any other public corporation, but, uniquely among all state entities, is excluded from all provisions of the California Government Code on claims, settlements, and judgments. California Gov't Code § 811.2 defines a "public entity" as "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation of the State." Gov't Code §§ 900.6 and 940.6 define the "State" as "the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the controller."[24] Gov't Code §§ 900 through 913.2 require a specific procedure for making claims against the State as well as state agencies and employees. The state itself is expressly named in Gov't Code § 905.2, which includes claims based on "express contract[s]" as well as torts.[25]

[24] Section 940.4 provides that " '[l]ocal public entity' includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State."

[25] "There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part [3] all claims for money damages against the state", and subdivision (c) thereof covers claims "[f]or money damages (1) on express contract, or (2) for an injury for which the state is liable."

Section 965.2 describes the payment of settlements, judgments, and claims thereon by warrants issued by the controller,[26] but three other sections in Division 3.6 of the Government Code[27] expressly exclude the Regents Corporation from coverage under all of the sections cited in the foregoing paragraph. Section 905.6 provides that "[t]his part [3] does not apply to claims against the Regents of the University of California."[28] Section 943 provides that "[t]his part [4] does not apply to claims or actions against the Regents of the University of California, nor to claims or actions against an employee or former employee of the Regents of the University of California arising out of such employment."[29] Finally, § 965.9 provides that "[t]his Chapter [1] does not apply to claims, settlements, and judgments against the Regents of the University of California."[30,31]

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[26] "The *controller* shall draw a *warrant* for the payment of any final *judgment* or *settlement* against the state whenever the Director of Finance certifies that a sufficient appropriation for the payment of such judgment or settlement exists. *Claims* upon such judgments and settlements are exempt from Section 925.6. *Claims* arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists. [emp. added]"

[27] Division 3.6 of the Government Code is entitled "Claims and Actions Against Public Entities and Public Employees" and includes § 940.6.

[28] Part 3 (of Division 3.6) is entitled "Claims Against Public Entities".

[29] Part 4 (of Division 3.6) is entitled "Actions Against Public Entities and Public Employees".

[30] Chapter 1 (of Part 5) is entitled "Payment of Claims and Judgments Against the State", and Part 5 (of Division 3.6) is entitled "Payment of Claims and Judgments".

[31] In addition, § 965.5 (b) provides that "[a] judgment for the payment of money against the state or a state agency is not enforceable under Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure but is enforceable under this chapter."

Read together, the foregoing sections lead to but one conclusion: the Regents Corporation is a public entity but it is *not* a part of the state government. As a result, the State itself is not legally liable for the payment of any settlement, judgment, or claim against the Regents. The exclusion of the Regents from the foregoing procedural requirements, which apply to all state agencies as well as the State itself, shows that the Regents Corporation is to be treated the same as a private corporation, in that a claim against it is made only by filing a lawsuit. Because of its complete autonomy, the Regents Corporation cannot be viewed as an "arm of the state". This conclusion is supported by opinions of the California Supreme Court, discussed in Sub-part B, *post* at 36.

Relying upon several of the foregoing provisions of the California Government Code, this Court itself concluded that the entity in question "cannot be deemed a mere agent of the State of California". *Moor v. County of Alameda*, 411 U.S. 693, 719 (1973). Analyzing California statutory law, this Court observed that the entity there "may sue and be sued" and is "designated a 'body corporate and politic'." *Ibid.* Turning to state decisional law, this Court stated that "we have the clearest indication possible from California's Supreme Court of the status of California's counties" (*id.*, at 720) and held that "we must conclude that this County has a sufficiently ***independent corporate character*** to dictate that it be treated as a citizen of California". *Id.*, at 721 (emp. added). Since, under cited provisions of the California Government Code, the Regents Corporation has an indistinguishable "independent corporate character", it follows that it too "cannot be deemed a mere agent [or arm] of the State of California. *Id.*, at 719.[32]

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[32] The California Supreme Court has held that the Regents constitute a "public corporation". *Estate of Royer*, 123 Cal. 615, 624 (1899); *Regents of the U.C. v. Superior Court (Regan)*, 17 Cal.3d 533, 536 (1976).

B. The Regents Corporation Is Not Cloaked With the Sovereign Immunity of the State of California According to the California Supreme Court.

In an employment discrimination suit brought under the First and Fourteenth Amendments as well as 42 U.S.C. § 1983, this Court held that a local board of education did not enjoy Eleventh Amendment immunity. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 281 (1977). The Court began its analysis by observing that "[t]he bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, [citations], but does not extend to counties and similar municipal corporations. See *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)". Continuing, the Court analyzed the situation as follows (*Mt. Healthy*, 429 U.S. at 280):

> The answer [to the Eleventh Amendment question] depends, at least in part, upon the nature of the entity created by state law. Under Ohio law the "State" does not include "political subdivisions," and "political subdivisions" do include local school districts. [Ohio code citation] . . . It [petitioner school board] is subject to some guidance from the State Board of Education, [Ohio code citation], and receives a significant amount of money from the State. [Ohio code citation]. But local school boards have extensive powers to issue bonds,[33] [Ohio code citation], and to levy taxes within certain restrictions of state law. [Ohio code citation]. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state.

Since California Government Code § 940.4 classifies any "public corporation" as a "local public entity" but expressly

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[33] The Regents Corporation also issues such bonds under Cal. Education Code § 92470.

excludes the State itself,[34] it follows that the Regents Corporation has the same Eleventh Amendment status as the school board in *Mt. Healthy*.

Decisions of California Courts strongly support the conclusion already drawn from provisions of the California Government Code, *ante*, at 33-35, that the Regents Corporation is not a part of the state government. Almost one hundred years ago, the California Supreme Court squarely held that:

> The university, while a governmental institution and an instrumentality of the state,[35] ***is not clothed with the sovereignty of the state and is not the sovereign***. As we understand the rule, it is only the sovereign that is exempt from the operation of statutes affecting its interest or rights. We think that the [probate] statute applies to the university as a ***public corporation***. [emp. added.]

Estate of Royer, 123 Cal. 615, 624 (1899). More recently, in a suit against the Regents Corporation, the California Supreme Court expressly followed *Royer* in denying immunity. *Regents of the University of California v. Superior Court (Regan)*, 17 Cal.3d 533, 536 (1976). There, the Regents Corporation was "acting in the capacity of manager of its endowment fund"[36] and sought exemption from the state's "usury laws". *Id.*, at 534. In ruling against immunity, the California Supreme Court observed (at 537) that:

> In choosing to invest its endowment by extending loans to borrowers such as the Regans, the University is acting in a capacity no different from a

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[34] Cal. Gov't Code § 940.4 provides that a "'local public entity' includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State."

[35] Note the loose usage of "instrumentality"; note also that *Royer*, like *Hamilton v. Regents*, was not an Eleventh Amendment case.

[36] Here the Regents Corporation is also acting as a manager, this time for an outside federal department, the Department of Energy.

> private university, corporation, or individual investing in a similar manner. The investment decisions the University makes are not uniquely governmental functions.[37] Careful investment of endowment funds does of course provide revenue for the operation of the University, but its decisions are not so closely related to its educational decisions to cloak the former with immunity even if the latter are immune. We therefore conclude that the University is entitled to no sovereign protection in its lending decisions.

The Regan Court also pointed out that under the California Constitution, "the University is intended to operate as independently of the state as possible. (See Cal. Const., art. IX, § 9.)" *Ibid.*, (footnote omitted).

Both the foregoing case and *Royer* were cited with approval by the California Supreme Court in *San Francisco Labor Council v. Regents of the University of California*, 26 Cal.3d 785, 789 (1980). The Court observed (at 788) that:

> Article IX, section 9 [of the California Constitution], grants the regents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the regents. This contrasts with the comprehensive power of regulation the Legislature possesses over other state agencies."[38]

It concluded that a state prevailing wage law did not apply to the Regents Corporation (*id.*, at 787), because "[s]alary determination is as important to the autonomy of the university as it is to the independence of chartered ***cities and counties***. [emp added]" *Id.*, at 791. Note that this Court, in *Mt. Healthy*,

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[37] Respondents similarly contend that the management of a federal nuclear research laboratory is hardly a unique function of a state governmental entity.

[38] Note the loose use of "agency", again in a case that did not involve the Eleventh Amendment.

419 U.S. at 280, held that the entity there was "more like a county or city than . . . an arm of the State."

Facts in a recent decision of a California Court of Appeal underscore the actual separation of the Regents Corporation from the State of California. In *Moores v. Walsh*, 38 Cal.App.4th 146 (1995), a dispute involving an easement over real property, we see that:

> In 1993, appellants purchased a 40-acre parcel of unimproved land (the Moores parcel) in Mendocino County from the Regents of the University of California (the Regents), pursuant to a **public bidding process**, for the purpose of logging the timber of the property. . . .
>
> The Moores parcel was granted to the State of California by the United States-as part of a "school lands" grant in 1873, leaving it landlocked on all sides by federally-owned land. The state conveyed the property to The Regents in 1978. The Walsh property consists of what was once six parcels conveyed by the United States to private owners between 1874 and 1881.

Id., at 1048 (emp. added). Of significance here is the formal conveyance of land from the State of California to the Regents. The only effect of state law thereon was the provision in the California Constitution, Article IX, Sec. 9(f), "that sales of university real property shall be subject to such competitive bidding procedures as may be provided by statute." If the Regents Corporation really is "the State itself" (BFP at 10; also at 3, 14, 16, 27), there would have been no need for a formal conveyance of land from the State to "itself"!

In another prevailing wage case decided very recently, a California Court of Appeal followed *San Francisco Labor Council* and distinguished an earlier Supreme Court decision because "the particular contract [between a private contractor and the Regents for a telephone system] did not involve internal UC affairs." *Regents of the University of California v.*

Aubry, 42 Cal.App.4th 579, 590 (1996).[39] Therefore, the degree of the independence of the Regents Corporation from state law depends upon the function it is performing in a particular case. In any event, the Regents Corporation is not cloaked with the sovereign immunity of the State of California.

C. The California Constitution Also Establishes the Independence of the Regents Corporation from State Control.

Article IX, section 9 of the California Constitution establishes the "Regents of the University of California" as the administrator of the University, "with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds . . . " (*id.*, subd. (a)). It also establishes "a board composed of seven ex officio members" (including the Governor) "and 18 appointive members appointed by the Governor and approved by the Senate" (*ibid*), whose "terms . . . shall be 12 years" (*id.*, subd. (b)). These appointees serve for fixed terms and not at the pleasure of the Governor. *Cf.*, *Hess*, 115 S.Ct. at 399, where "[e]ach State may remove, for cause, the commissioners it appoints", and "[t]he governor of each State may veto action of the Port authority commissioners from that State". Here, the 18 appointees can easily outvote the Governor and the six other ex officio regents.

Subdivision (f) includes the most relevant provisions (emp. added):

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[39] The independence of the Regents Corporation from control by either the state legislature or the governor's office is further illustrated by the necessity for it to file a lawsuit against a state agency to determine "whether a state university's delivery of unstamped letters from a labor union to university employees violates the Private Express Statutes, 18 U.S.C. §§ 1693-1699, 39 U.S.C. §§ 601-606." *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 591 (1988).

> The Regents of the University of California shall be vested with the ***legal title and the management and disposition of the property of the university*** and of property held for its benefit and shall have the ***power to take and hold, either by purchase or donation***, or gift, testamentary or otherwise, or in any other manner, without restriction, ***all real and personal property for the benefit of the university*** or incidentally to its conduct; . . . Said corporation shall also have all the powers necessary or convenient for the effective administration of its trust, including the power to ***sue and be sued***, to use a seal, and to delegate to its committees or to the faculty of the university, or to such others, such authority or functions as it may deem wise. . . . The Regents shall receive all funds derived from the sale of lands pursuant to the act of Congress of July 2, 1862, and any subsequent acts amendatory thereof. The university shall be ***entirely independent of all political or sectarian influence*** and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . .

If the Regents Corporation had any more autonomy, it would be a private entity.

All regents are not created equally. For example, the "powers and duties of the [Arizona] Board of Regents [of a state university] are regulated by the state legislature". *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981), aff'd sub nom. *Kush v. Rutledge*, 460 U.S. 719 (1983), and "[i]ts funds would be state funds from which the damages appellant seeks must be paid." *Id.*, at 1350. The Mississippi State University is similarly situated. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976). There, the legislature had great power over the university, including the power to "consolidate or abolish" it, under Article 8, § 213-A of the State Constitution. *Id.*, at 1174. "Under state law Mississippi is inextricably intertwined in all facets of the Board [of Trustees]'s operation of the University". *Ibid*. The University of Minnesota, under then Article VIII, § 3 of the State

Constitution (recodified in 1974 as Art. XIII, § 3), also lacks independence from control by the State. *Walstad v. University of Minnesota Hospitals*, 442 F.2d 634, 641 (8th Cir. 1971) ("Constitution provides that the University . . . is an instrumentality of the state and expressly reserves all immunities to the University"). Therefore, the long list of cases cited by Petitioners in which immunity was granted to state universities (BFP at 13 n. 6) has dubious value. In *Kovats v. Rutgers, the State University*, 822 F.2d 1303, 1312 (3d Cir. 1987), immunity was denied to a university that is almost as independent of state control as the Regents Corporation herein.

As circuit courts have often cautioned, "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances." *Soni v. Board of Trustees of University of Tenn.*, 513 F.2d 347, 352 (6th Cir. 1975). *Accord, Kroll v. Board of Trustees of Univ. of Illinois*, 944 F.2d 904 n. 2 (7th Cir. 1991) (quoting *Soni*), *Kovats*, 822 F.2d at 1312 (quoting *Soni*), *Hall v. Medical College of Ohio*, 742 F.2d 299, 302 (6th Cir. 1984) (quoting *Soni*), *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. 1982), and *Vaughn v. Regents of Univ. of Cal.*, 504 F.Supp. 1349, 1353 (E.D. Cal. 1981). Here, the unique provisions of the Constitution, statutes, and court decisions of the State of California uniformly demonstrate that the Regents Corporation is not an "arm of the state", and the fact that there can be no impact on the state treasury underscores this conclusion.[40]

IV. The National Security Should Not Be Sacrificed On The Altar Of The Eleventh Amendment.

As mentioned previously, the principal issue in this case involves defendants'-petitioners' alleged violations of federal security clearance regulations (Second Amended Complaint, ¶¶ 10, 11, 13, 14, 23-26, J.A. at 48a, 49a, 51a). The accuracy

[40] The extent of the Regents' autonomy renders it unable to meet the standards for state control required by the dissent in *Hess*, 115 S.Ct. at 411.

of the foundation of these allegations was confirmed by the Department of Energy itself in the Federal Register of July 8, 1994 at 35179. As a preface to publishing amendments to 10 CFR Part 710 after considering comments from the public, the DOE explained, under "Suggested Additions to Regulations":

> Two commentators [including Counsel of Record herein] suggested a provision that would prohibit DOE contractors from making employment decisions based upon security implications of the results of their pre-screening of job applicants. This type of provision is unnecessary. By law, only the Department of Energy makes determinations on requests for DOE access authorization. It is DOE policy that contractors are to establish job employment suitability of prospective employees prior to and separate from making a request to DOE for access authorization.

Disputes over federal security clearances have long been the exclusive province of federal courts.[41] See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959), *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), *Department of the Navy v. Egan*, 484 U.S. 518 (1988), *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047 (1988), *Carlucci v. Doe*, 488 U.S. 93, 109 S.Ct. 407 (1988), *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973), *Hoska v. Dep't of the Army*, 677 F.2d 131 (D.C. Cir. 1982), *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984), *Doe v. Cheney*, 885 F.2d 898 (D.C. Cir. 1989), *Dubbs v. CIA*, 866 F.2d 1114 (9th Cir. 1989), *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F.Supp. 1361 (N.D. Cal. 1987), rev'd 895 F.2d 563 (9th Cir. 1990), *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), and *Hill v. Department of the Air Force*, 844 F.2d 1407 (10th Cir. 1988).

[41] Respondents' counsel has been unable to find any California state court decision involving an actual security clearance issue (as distinguished from a mention thereof, as in *TRW, Inc. v. Superior Court*, 25 Cal.App.4th 1834 (1994)).

Although in *Egan*, 484 U.S. at 528-530, this Court substantially limited judicial review of security clearance determinations, it nonetheless permitted review of procedural errors. *Id.*, at 526 ("the requisite procedural protections"), at 530 ("an employee . . . is entitled to the several procedural protections specified in that statute"), and at 533 ("procedural protections", including "notice of the reasons for the proposed denial, a written decision, a right to respond, and an opportunity to appeal"). Before reaching its conclusion, the *Egan* Court (at 528) cited "10 CFR § 710.10(a) (1987) (Department of Energy)", part of the very regulation upon which Respondent herein bases his claim. In addition, this Court subsequently made clear "that a constitutional claim based on an individual discharge may be reviewed by the District Court". *Webster*, 486 U.S at 603-04, followed in *Dubbs*, 866 F.2d at 1118-1120 (expressly reversing (at 1120), "[o]n the authority of *Webster*", a grant of summary judgment for the government). At the very least, Respondents are entitled to judicial review of their allegation that "[i]n deciding not to employ Plaintiff Doe and approving the recommendations of his subordinates not to do so, Defendant Nuckolls violated the foregoing federal law on security clearances by determining that Plaintiff Doe could not obtain a security clearance from the DOE" (Second Amended Complaint, ¶ 24, J.A. at 51a).

A. Plaintiff Doe's Contract for Employment at the LLNL Presents Federal Questions Involving Security Clearances and Contract-Based Property Rights to Procedural Due Process Under the Fourteenth Amendment.

Directly related to the security clearance issue is whether, based on the property right that arises from Plaintiff Doe's alleged employment contract, defendants denied him procedural due process in refusing to employ him under that contract (Second Amended Complaint, ¶¶ 9, 10, 19, J.A. at 47a-48a, 50a). This issue was raised by the District Court below (J.A. at 30a):

> Similarly, Plaintiff may be able to show that he is a party to a valid employment contract, and thus has a property interest sufficient to entitle him to procedural due process. See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971) (university employees dismissed during the terms of their contracts have interests in continued employment which are safeguarded by due process).

Since no further proceedings were had in the district court after it granted the motion of Plaintiffs-Respondents for immediate appeal under Rule 54(b), the validity of Plaintiff Doe's employment contract was not adjudicated.

It is clear from the opinion of the Ninth Circuit below that the instant case is before this Court on a motion to dismiss (J.A. at 13a). Therefore, the allegations in paragraphs 9, 10 and 19 of the Second Amended Complaint must be taken as true, so that it must be assumed at this stage of the litigation that a valid contract exists between Respondent and Petitioners. *Perry v. Sindermann*, 408 U.S. 593, 599 (1972) ("the respondent's allegations – which we must construe most favorably to the respondent at this stage of the litigation –"); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 539 n. 5 (1985) (Petitioner's argument "makes factual assumptions . . . that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage.")[42]

Based on the foregoing employment contract, it follows from *Roth* (408 U.S. at 576-77), *Perry* (408 U.S. at 603) and *Loudermill* (470 U.S. at 583) that Plaintiff has a property right, so that Petitioners may not deprive him thereof without procedural due process of law. Moreover, these precedents

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[42] Paragraph 9 contains factual allegations of offer and acceptance. Accepting these allegations as true means, as a matter of law, that a contract between Plaintiff and defendants was formed. Paragraph 10 alleges that defendants "attempted to 'withdraw' the offer and refused to employ Plaintiff Doe in any position." Accepting these allegations as true means that defendants' attempt was not successful.

require some kind of hearing before termination of employment is permitted. *Roth*, 408 U.S at 570 ("some kind of prior hearing"); *Loudermill*, 470 U.S at 541 ("an opportunity for a hearing ***before*** he is deprived of any significant property interest"). Even *Loudermill* requires at least a post-termination hearing (470 U.S. at 546), but Plaintiff Doe received no hearing whatsoever. That is, Petitioners simply "refused to employ Plaintiff Doe in any position" (Second Amended Complaint, ¶ 10, J.A. at 48a).

Under the part of Code of Federal Regulations cited by this Court in *Egan*, 484 U.S. at 528, Plaintiff-Respondent Doe would have enjoyed many procedural protections. For example, 10 CFR §§ 710.22, 710.26, 710.27, 710.28, 710.30, 710.32 and 710.34 respectively provide for notice to the individual of the charges against him and of the right to an in-person hearing, the appointment of a hearing officer, regulation of the conduct of the hearing (including a provision for cross-examination), a written determination by the hearing officer (including specific findings), review of an adverse recommendation of the hearing officer by a Personnel Security Review Examiner, final determination by the Assistant Secretary [of Energy] for Defense Programs, and for reconsideration of cases. Of course, the foregoing recommendations and determinations would be made by DOE personnel "with the necessary expertise in protecting classified information", and not by "outside non-expert" persons such as Petitioners' nominal employees who work at the LLNL. *Egan*, 484 U.S. at 529. Note carefully that Respondent Doe is not asking any court to create some kind of procedure for him, but only to enforce existing federal regulations which, according to the DOE, prohibit Petitioners' non-expert personnel from making security clearance determinations.

Clearly, Plaintiff's security clearance allegations give rise to a federal claim based (*inter alia*) on a contractual property right, *Loudermill*, 470 U.S. at 541 ("minimum [procedural] requirements [are] a matter of federal law"). Respondents submit that such a federal claim should be decided by a federal

court.[43] See, e.g., *Students of California School for the Blind v. Honig*, 745 F.2d 582, 586 (9th Cir. 1984) (Kennedy, J., dissenting from failure to take en banc), suggesting that federal courts should decide matters of federal law ("Promotion of federal supremacy is not served by entertaining in federal courts actions by persons against states based on state law. . . . State courts are available for that purpose"); see also *Cannon v. University of Chicago*, 441 U.S. 677, 708 (1979) (where the "subject matter does [not] involve[ ] an area basically of concern to the States", "the federal courts have been the primary and powerful reliances in protecting citizens" (internal quotation marks omitted)).

Since protecting the national security herein would not affect the Regents' educational decisions nor their management of the university in general, Eleventh Amendment immunity would serve no positive purpose here. On the contrary, a grant of immunity here might have an adverse impact by encouraging future wrongdoing by employees of the LLNL and of other defense contractors. Precedent, uniformity and reviewability of decisions, and common sense indicate that judicial review of federal security clearance issues should be made by federal courts.

V. Plaintiffs' Claims Under 42 U.S.C. § 1983 Are Proper Independent Of The Eleventh Amendment Issue (Since They Seek Only Prospective Injunctive Relief Against Official Capacity Defendants), And "State Action" Under The Fourteenth Amendment Is A Much Broader Concept Than "Arm Of The State" Under The Eleventh Amendment.

It is well settled that prospective injunctive relief against official-capacity state defendants is not barred by the Eleventh

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[43] The Complaint may need amending to present the hearing issue squarely. Paragraph 12 of the Second Amendment Complaint (J.A. at 48a) indicates that Plaintiff's attempts to meet with defendants were unsuccessful, but more facts may be required. However, this Court has ruled that "on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Amendment. *Hafer v. Melo*, 502 U.S. 21, 27 (1991), following *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989); *Edelman v. Jordan*, 415 U.S. 651, 667 (1974); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102-103 (1984); *Papasan v. Allain*, 478 U.S. 265, 276 (1986); and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146, 113 S.Ct. 684, 688-698 (1993). Petitioners are well-aware of the significance of these authorities (Pet. for Cert. at 24 n. 21). Therefore, the only arguable basis for Eleventh Amendment applicability is the purported money damage issue. (See BFP at 35-36 n. 15.)

Plaintiff Doe's claims under 42 U.S.C. § 1983 for employment or reconsideration thereof without reference to security clearance concerns are prospective in nature. *Cerrato v. San Francisco Community College District*, 26 F.3d 968, 973 (9th Cir. 1994) ("the prospective hiring of Cerrato"). According to Ninth Circuit authority, the "distinction [is] between prospective or ancillary relief, which refers to relief given in the future pursuant to an injunction, and retroactive relief, which refers to the payment of damages to compensate for past injuries." *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1511-12 (9th Cir. 1994). Accord, *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244, 1251 (9th Cir. 1994) (suit is barred "when the relief sought is *retrospective* in nature, i.e., damages"); and *Lassiter v. Alabama A & M University*, 3 F.3d 1484, 1485 (11th Cir. 1993) ("he still seeks the prospective relief of reinstatement"). In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 n. 14 (1996), this Court held that "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law", citing *Ex parte Young*. Since the § 1983 claims herein are against only official capacity defendants and are wholly prospective in nature (back pay is not sought under this section), it follows that they are not barred by the Eleventh Amendment in any case.

A. "State Action" Under the Constitution and § 1983 Is Much Broader Than "Arm-of-the-State" Under the Eleventh Amendment, Under Which Cities, Counties, Other Political Subdivisions, and Bi-State Agencies Are Not Immune.

In *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 281 (1977), this Court held that a local board of education did not enjoy Eleventh Amendment immunity. Nonetheless, it was undisputed that that case involved "state action", since jurisdiction was established under 28 U.S.C. § 1331 for alleged violations of the First and Fourteenth Amendments. *Id.*, at 279. Almost a hundred years earlier, this Court explicitly held that "[t]he Eleventh Amendment limits the jurisdiction [of a federal court] only as to suits against a State." *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), so that the Eleventh Amendment does not apply to counties. *Id.*, at 530-31. There, this Court observed that "it [the county] is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Ibid.* More recently, in *Hess*, 115 S.Ct. at 397, this Court held that a bi-state entity was not an arm of the state for Eleventh Amendment purposes and permitted the suit, which raised a federal question under the Federal Employers' Liability Act, to go forward.

Moreover, this Court held in *Monell v. Dept. of Social Services*, 436 U.S. 658, 690 (1978) that a city or other municipality is a "person" under § 1983, but "cannot be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* expressly noted that "Eleventh Amendment concerns [did] not control analysis" there. *Id.*, at 690 n. 55. In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 n. 14 (1996), this Court expressly held "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law" (citing *Ex parte Young*). Clearly, a person or (other) entity may be capable of "state action" under § 1983 and the Fourteenth Amendment without being an "arm of the state" entitled to Eleventh Amendment immunity.

CONCLUSION

The judgment of the Ninth Circuit below should be affirmed. Its opinion correctly holds that "[t]he University is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions" (J.A. at 17a). Because this case, with its "pay directly" provision in the Contract between the Regents Corporation and the DOE, is *sui generis* in the extreme, no undesirable precedent can result from the requested affirmance.

In sum, the principal purpose of the Eleventh Amendment is to protect state treasuries from money judgments rendered by federal courts. *Edelman*, 415 U.S. at 660-663 (summarizing history surrounding this Amendment); *Hess*, 115 S.Ct. at 404. It also prohibits equitable relief against a state itself or an arm thereof, but the Regents Corporation is not such an entity because it is fully autonomous. As a result, the state's dignitary interest cannot be impaired. Section 1983 permits equivalent prospective relief against state officials, *Edelman*, at 677-78, and no injunctive relief sought herein could possibly affect the operation of state government. Since the relief sought herein is limited to matters affecting only the LLNL, a federal nuclear research facility owned by the U.S. Department of Energy and operated by the Regents under a commercial contract, the Eleventh Amendment does not apply to this lawsuit.

October 1996

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(12)

No. 95 - 1694

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

Petitioners,

v.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court granted review to decide

> [w]hether an entity, *which otherwise would be considered part of the State or an "arm of the State" and thereby immune from suit in federal court under the Eleventh Amendment*, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

Pet. i (emphasis added). That question has divided the courts of appeals. *See* Pet. 9-21. Well over half of respondents' brief on the merits is devoted to other issues, including: (1) whether the Court should reconsider the test for determining "arm of the State" status, Resp. Br. 16-28; (2) whether the University is an arm of the State of California, *id.* at 32-42; (3) whether the University has waived Eleventh Amendment immunity, *id.* at 29-32; and (4) whether Doe has a valid claim under federal law, *id.* at 42-47. Respondents' brief ignores this Court's Rule 14.1(a), which requires the parties to "focus on the questions the Court has viewed as particularly important," rather than "fill[ing] their limited briefing space . . . with discussion of issues other than the one on which certiorari was granted." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992). Moreover, as discussed below (*infra* pp. 7-19), the additional issues raised by respondents lack merit.

I. ELEVENTH AMENDMENT IMMUNITY DOES NOT TURN ON WHETHER A STATE ENTITY HAS A CLAIM FOR INDEMNIFICATION OR REIMBURSEMENT AGAINST A THIRD PARTY.

A. Respondents' Argument Is Contrary To Basic Eleventh Amendment Principles.

Respondents contend (Resp. Br. 5-16) that the University is not entitled to Eleventh Amendment immunity in this case because any judgment rendered against the University "would be paid fully and directly by the United States Department of Energy" (DOE). Resp. Br. 5. As petitioners' opening brief explains (Pet. Br. 12-35), however, a State or State entity that otherwise is entitled to Eleventh Amendment immunity does not lose that immunity in a particular case even if the plaintiff

were able to establish that the State has a claim for indemnification or reimbursement against a third party.[1]

First, the Eleventh Amendment confers immunity from suit, not merely protection against the financial impact of money judgments. Consequently, the Eleventh Amendment bars suits in federal court against unconsenting States even if the plaintiff seeks no money judgment at all. *See Cory v. White*, 457 U.S. 85, 90-91 (1982). It follows that the Eleventh Amendment bars suits seeking money judgments against unconsenting States, without regard to whether the State has a claim for indemnification or reimbursement.

Second, notwithstanding the University's claim for indemnification, Respondent Doe's suit subjects the University to the coercive process of the federal courts. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996). Doe has sued the University, not the federal government; if Doe were to prevail, he would be entitled to execute his judgment against the University, not the United States. *See* J.A. 21a (Canby, dissenting).

Third, Doe has asked the federal court to enter "an Order for specific performance requiring . . . [the University] to employ Plaintiff Doe . . .." J.A. 52a. The University would be required to carry out such an order even if a money judgment were paid in full by the federal government. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (suit is barred if "judgment sought would

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[1] As the Solicitor General observes (U.S. Br. 15 n.10), the panel majority's reasoning would permit a suit against the State, as well as a State entity, whenever a federal court concluded that a judgment against the State is likely to be paid by a third party. Moreover, the panel majority's approach permits plaintiffs (including respondent Doe) to bring state-law claims against State entities under the federal court's diversity jurisdiction. *See* Pet. Br. 15 n.8.

expend itself on the public treasury or domain" *or* "restrain the Government from acting, *or* . . . compel it to act") (emphasis added; internal quotation and citations omitted).

Respondents overstate the facts in asserting (Resp. Br. 7) that "there is not even the potential for state funding" of a judgment against the University. The indemnity agreement between the DOE and the University, although "relatively clear," J.A. 22a (Canby, J., dissenting), contains significant exceptions. The DOE is not obligated to indemnify the University if it concludes that the judgment was "caused directly by bad faith or willful misconduct" by an officer of the University or the Laboratory Director, J.A. 77a, and the DOE's obligation to the University is "subject to the availability of funds appropriated from time to time by Congress," J.A. 78a. The Solicitor General states (U.S. Br. 7) that "DOE has not determined whether or not it is contractually obligated to pay the costs of any judgment that may be entered against the University in this case."

Respondents emphasize (Resp. Br. 9-10) that the University would not be required to advance State funds to pay a judgment, because it could pay the judgment with federal funds through an "advanced funding" mechanism. U.S. Br. 4. The fact remains, however, that if the DOE were subsequently to determine that the judgment is not an allowable cost, the University would be required to pay the judgment out of State funds. As the Solicitor General observes (U.S. Br. 25), "under elementary principles of *res judicata*, a determination that the federal government is contractually obligated to provide indemnification would not be binding on the United States." U.S. Br. 25.

Respondents insist that this case is "primarily a federal civil rights action" rather than a contract action. Resp. Br. 1. Contrary to respondents' contention (Resp. Br. 42-47), it is well-settled that the Eleventh Amendment applies equally to

federal question and diversity jurisdiction. *See Seminole Tribe*, 116 S. Ct. at 1122. Furthermore, the *only* claim that Doe has pursued on appeal against the University is a State-law contract claim, and Doe has stated that he will remain in federal court only if he can pursue his contract claim. *See* J.A. 38a-40a.[2]

B. The Panel Majority's Approach Would Require Extensive Case-By-Case Inquiries Into A State Entity's Finances To Decide Claims Of Eleventh Amendment Immunity.

Petitioners' opening brief shows (Pet. Br. 28-35) that the Court of Appeals' approach would require burdensome discovery and mini-trials to decide the threshold issue of Eleventh Amendment immunity. *See also* U.S. Br. 22-25 (panel majority's approach requires federal courts to resolve "potentially complex and fact-intensive issues of indemnification coverage" at the outset of litigation).

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[2] Respondents' federal law claims lack merit. An applicant for employment, unlike a tenured employee, generally has no protected property interest under the Due Process Clause. *See Board of Regents v. Roth*, 408 U.S. 564, 576 (1972) (due process protects only "interests that a person has already acquired in specific benefits"). Although Doe alleges that he has a protected interest in the form of contractual rights, the availability of a State-law action for breach of contract satisfies the requirements of due process. *Cf. Ingraham v. Wright*, 430 U.S. 651, 678-80 (1977). A different approach would convert garden-variety breach of contract claims into constitutional cases. *See generally Bishop v. Wood*, 426 U.S. 341, 349 (1976) ("federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) (Powell, J., concurring) ("[j]udicial review of academic decisions . . . is rarely appropriate"). Finally, neither Executive Order No. 10865 nor 10 C.F.R. Part 710 gives rise to an enforceable right to challenge a government contractor's decision not to hire an applicant for employment.

Respondents' proposal (Resp. Br. 28-29) to "minimize" these difficulties by adopting three new procedural rules in Eleventh Amendment cases is without merit.

Two of respondents' three proposed "rules" merely impose *additional* restrictions on States, and so cannot possibly be regarded as protecting the States' dignitary interests.[3] Respondents' third proposal is that the defendant be required to make a "minimal" showing in support of its claim to Eleventh Amendment immunity, after which a plaintiff would be required to obtain information about the entity's finances from public sources if possible. Respondents' own description of this proposal reveals its emptiness: If the state entity "does not cooperate fully in producing the requested documents," then the plaintiff would be entitled to "discovery of the entity's finances, including the production of relevant documents," and an order to compel production "if the entity resists." Resp. Br. 29.

In short, making Eleventh Amendment immunity turn on a prediction about the financial impact of a particular judgment is inconsistent with this Court's recognition that claims of Eleventh Amendment immunity should not "implicate[ ] any extraordinary factual difficulty." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* ("*PRASA*"), 506 U.S. 139, 147 (1993). To make such a prediction, federal courts would be compelled to engage in a "detailed audit of the defendant's finances." *Paschal v. Jackson*, 936 F.2d 940, 944 (7th Cir. 1991), *cert. denied sub nom. Paschal v. Didrickson*, 502 U.S. 1081 (1992). Subjecting States to "detailed audits" to decide the threshold

[3] Doe proposes (Resp. Br. 28-29) that a State be required to raise an Eleventh Amendment immunity claim within 30 days after the complaint is served, and also be required, as a prerequisite to raising a claim of Eleventh Amendment immunity, to waive any statute of limitations defense it may have to a subsequent action in State court.

immunity question hardly "ensur[es] that the States' dignitary interests [are] fully vindicated." *PRASA*, 506 U.S. at 146.

II. THE ADDITIONAL ARGUMENTS RAISED IN RESPONDENTS' BRIEF DO NOT SUPPORT THE COURT OF APPEALS' DECISION.

A. The University Of California Is An "Arm Of The State."

Respondents argue at length (Resp. Br. 16-42) that the University is not an arm of the State of California, and therefore is not "otherwise" entitled to Eleventh Amendment immunity even in the absence of a contractual right to indemnification. As the panel majority recognized (J.A. 17a), however, courts have uniformly held that the University is a State entity for Eleventh Amendment purposes.[4] These precedents are consistent with many other decisions holding that State universities are entitled to Eleventh Amendment immunity.[5] The Court of Appeals did not question these decisions, but instead distinguished them solely on the ground that "in this specific instance," a money judgment most likely would be paid by the DOE. J.A. 18a. Accordingly, rejecting

[4] *See Mascheroni v. Board of Regents of the Univ. of Cal.*, 28 F.3d 1554, 1559 (10th Cir. 1994); *Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir. 1992); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Eng'g v. Univ. of Cal.*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *In re Holoholo*, 512 F. Supp. 889, 895 (D. Haw. 1981); *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981); *Selman v. Harvard Med. Sch.*, 494 F. Supp. 603, 615 (S.D.N.Y.), *aff'd w'out opinion*, 636 F.2d 1204 (2d Cir. 1980).

[5] *See* Pet. Br. 13 n.6 (collecting authorities); Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 Geo. L.J. 1723, 1746-51 (1990) (same).

this ground of decision, as petitioners urge, would suffice to justify reversal of the Court of Appeals' decision.

In asking the Court to take up a hitherto unraised question and to hold that the University is not an arm of the State, respondents also ask the Court to announce a general test for determining "arm of the State" status. *See* Resp. Br. 16-28. Disposition of this case does not require any such disquisition. For even if the question were properly raised, the University is an arm of the State under any reasonable approach to determining arm-of-the-State status. In petitioners' view, however, it is sufficient for Eleventh Amendment purposes that the University (1) is treated under State law as a co-equal branch of State government, (2) pursues the important State objectives of providing public higher education and supporting research, and (3) is governed by a body composed almost entirely of elected State officials and appointees of the Governor confirmed by the State Senate. *Cf. Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 974 (1995) ([W]here government "creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

1. Under California Law, The University Is A Branch Of State Government.

Under California law, the University is "'a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive.'" J.A. 16a, *quoting* 30 *Ops. Cal. Atty. Gen.* 162, 166 (1957).[6] The Board of Regents, the

[6] The California Constitution provides:

"The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and for other [specified purposes]."

Cal. Const., art. IX, § 9(a).

University's governing body, is composed of: (1) seven *ex officio* members, including the Governor, Lieutenant Governor, Speaker of the Assembly, and Superintendent of Public Instruction (an elected official); and (2) 18 members appointed by the Governor and approved by the State Senate. Cal. Const., art. IX, § 9(a). The California courts "clearly recognize[ ] the University as a branch of the state government." J.A. 16a, *citing Regents of the Univ. of Cal. v. City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978) (University is "a constitutionally created arm of the state"); *Ishimatsu v. Regents of the Univ. of Cal.*, 72 Cal. Rptr 756, 763 (Cal. Ct. App. 1968) (University is "a statewide administrative agency"). *See also Penington v. Bonelli*, 59 P.2d 448, 450 (Cal. Dist. Ct. App. 1936) (University is "a branch of the state itself").[7]

In *Hamilton v. Regents of the University of California*, 293 U.S. 245, 258 (1934), this Court held that the Regents exercise "state law-making power," such that an order of the Regents is the equivalent of a "statute of [the] State" of California. The Court concluded that "by the California constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university, which, as it has been held, is a constitutional department or function of the state government."

[7] As an arm of the State, the University is exempt from local regulation, *Regents v. Santa Monica*, 143 Cal. Rptr. at 279-80, and local taxation, Cal. Educ. Code § 92443, and possesses the power of eminent domain, *id.* § 92439.

Id. at 257, *citing Williams v. Wheeler*, 138 P. 937 (Cal. 1913); *Wallace v. Regents*, 242 P. 892 (Cal. 1925).[8]

Respondents' argument rests on a fundamentally flawed premise — that the University is too "independent" of the elected branches of State government to warrant protection under the Eleventh Amendment. Resp. Br. 32-42. The Eleventh Amendment is not a constitutional straitjacket that applies only when the States adhere to a single rigid model for structuring State government. While the California Constitution grants the University considerable autonomy from the other branches of State government,[9] California's long-standing and much-commended policy of removing governance of the University from the partisan arena does not make the University any less an arm of the State. *See* Knivila, Note, *Public Universities and the Eleventh Amendment*, 78 Geo. L.J. 1723, 1742 (1990) ("Properly viewed," autonomy of state university "strongly weigh[s] in favor of . . . finding that the university is an arm of the state"). The University's status within the California government is analogous to that of the Judicial Branch, or an "independent" agency such as the Securities and Exchange Commission. Courts and independent agencies enjoy substantial independence from the

[8] Although *Hamilton* was not an Eleventh Amendment case, the Court's holding that the Board of Regents exercises a portion of the State's "law-making power" plainly is indicative of the University's status under the Eleventh Amendment.

[9] *See generally* Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 Hastings L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 UCLA L. Rev. 23 (1977).

political branches of government, yet that does not make them — or the University — any less a part of the government.[10]

Furthermore, respondents' hyperbolic statement (Resp. Br. 41), that if the University "had any more autonomy, it would be a private entity," ignores the important connections between the State's elected officials and the University. The State's three senior elected officials are *ex officio* voting members of the Regents, and the Governor traditionally serves as its Chairman. Eighteen of the 21 Regents who are not themselves elected officials are appointed by the Governor and approved by the California Senate. In addition, the University is dependent on appropriations by the Legislature, and the University's handling of public funds is subject to "legislative scrutiny" and auditing by State officials. *California State Employees Ass'n v. Flournoy*, 108 Cal. Rptr. 251, 262 (Ct. App. 1973) (*quoting* 3 *Ops. Cal. Atty. Gen.* 108, 109 (1944)), *cert. denied*, 414 U.S. 1093 (1973); *see also* Cal. Govt. Code § 13294. California's elected officials thus clearly "retain[] a measure of control" over the University. *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1353 (E.D. Cal. 1981).

2. *Hess* Supports The Conclusion That The University Is A State Entity.

This Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994), much relied on by respondents, rests on the conclusion that Compact Clause entities "occupy a significantly different position in our federal

[10] Respondents' argument points to the conclusion that independent federal agencies are not part of the federal government, because their decisions are not directly controlled by elected officials. Actually, independent federal agencies such as the SEC may be viewed as subject to *less* control by elected officials than the University, because no elected official is a voting member of the SEC.

system than do the States themselves." *Id.* at 400. "Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Id.* at 401 (quoting U.S. Const., amend. XI). Consequently, the Court concluded that suit in federal court is neither "an affront to the dignity of a Compact Clause entity" nor a threat to "the integrity of the compacting States." 115 S. Ct. at 400. Notwithstanding that conclusion, the Court proceeded to consider whether the constituent States were financially responsible for the compact entity's operations, for in that event "the vulnerability of the State's purse" would have entitled the Compact Clause entity to the immunity available to its constituent States. *Id.* at 404.

In *Hess*, the Court withheld Eleventh Amendment immunity from the Port Authority Trans-Hudson Corporation ("PATH"), based on PATH's "long history of paying its own way," in contrast to entities that depend on appropriations from State revenues to meet their operating budgets. 115 S. Ct. at 405. *See also* Resp. Br. 20 (issue is whether entity is "self-sufficient or otherwise financially independent of the state"). This analysis supports affording Eleventh Amendment immunity to the University.

The California Constitution provides that public support of the University "[f]rom all state revenues" is a "first" priority of the Legislature. Cal. Const. art. XVI, § 8(a). In accordance with that provision, the University receives very large unrestricted appropriations from general State revenues.[11] The University depends on regular infusions of general State revenues to carry out its mission. *See Flournoy*,

[11] In the fiscal year ending June 30, 1992, the University's consolidated budget of $9.8 billion included more than $2.2 billion in funds appropriated by the Legislature out of the state's general revenues. *See* 9th Cir. Pet. for Rehearing, App. at 208.

108 Cal. Rptr. at 261 (University is "dependent upon legislative appropriations of tax revenues"). The University is thus quite different from PATH, which was "[c]onceived as a fiscally independent entity" and "for decades has received no money from the States." *Hess*, 115 S. Ct. at 403. Because the University is not "structured to be self-sustaining," but rather is "constantly dependent on funds" appropriated by the State Legislature, judgments against the University, "as a practical matter," will expend themselves against the State treasury. 115 S. Ct. at 405. *See also id.* at 410 (O'Connor, J., dissenting) ("Court *is* entirely right . . . to suggest that the Eleventh Amendment confers immunity over entities whose liabilities are funded by state taxpayer dollars" (emphasis in original)); *Selman*, 494 F. Supp. at 615 ("any damage claim resulting from a lawsuit" against the University would be paid "from public funds").

Furthermore, *all* funds of the University — whether derived from general tax revenues or from other sources such as tuition, grants, and investment income — are State funds. Under California law, "[a]ll [the University's] property is property of the state." *In re Royer's Estate*, 56 P. 461, 463 (Cal. 1899); *see also In re Bacon*, 49 Cal. Rptr. 322, 329 (Cal. Ct. App. 1966); *Vaughn*, 504 F. Supp. at 1353 (judgment against the University must be paid out of "the state treasury or other sources of *state* funds" (emphasis in original)). As the court explained in *Vaughn*, the Eleventh Amendment is not limited to cases where a judgment would be paid "literally out of the general treasury," but also applies to cases in which payment would be made from other "state-held funds." *Id.* at n.5 (citations omitted).

3. A "Functional Analysis" Also Supports The Conclusion That The University Is A State Entity.

Respondents urge (Resp. Br. 25-28) the Court to engage in a "functional" analysis, but this type of analysis does not provide a basis for sustaining the decision of the panel majority. By statute, the University is entrusted with primary state-wide responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1996). It has exclusive authority over public education in law, medicine, and certain other professions, and has "sole authority . . . to award the doctoral degree in all fields of learning," except by agreement with the California State University. *Id.* As the panel majority recognized, "[t]he regulation of public education is an important central government function." J.A. 16a. *See also Vaughn*, 504 F. Supp. at 1353 ("Regents perform the essential governmental function of providing the citizens of the State of California with a higher education").

Respondents argue, however (Resp. Br. 25-28), that courts should analyze the University's functions on a piecemeal basis. Even the panel majority rejected that argument, concluding that it should "look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory." J.A. 15a (citation omitted). Respondents' "disaggregation of functions" approach would permit plaintiffs to engage in endless litigation over Eleventh Amendment immunity by arguing that even if the University as a whole is a State entity, some aspect of its activities (*e.g.*, athletic activities, textbook sales, food service, operation of parking lots) is not a governmental function. To be sure, an entity's activities may develop and change over time, so that a reexamination of the entity's Eleventh Amendment status is warranted. But such a reexamination, if warranted, must consider the entity as a whole. *See Kroll v.*

Board of Trustees of Univ. of Ill., 934 F.2d 904, 908 n.3 (7th Cir. 1991)[12]

Respondents also urge the Court to withhold immunity on the ground that the University's activities at the Lawrence Livermore National Laboratory are "commercial" rather than "governmental" in nature. In a related constitutional context, the Court has recognized that this distinction is "untenable" and lacks "principled content." *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 543, 583 (1984). In any event, the Laboratories engage in scientific research — surely a core function of a university. Although the research activity is funded by the federal government, much research activity in public universities is funded by outside sources. *See generally* Clark Kerr, *The Uses of the University* (4th ed. 1995).

4. Respondents' Other Arguments Do Not Alter The Conclusion That The University Is A State Entity.

Respondents incorrectly assert (Resp. Br. 36-40) that the University "is not cloaked with the sovereign immunity of the State of California." *Id.* at 40. California law expressly provides that the Board of Regents is a "public entity" that cannot be sued absent a waiver of sovereign immunity. *See* Cal. Govt. Code §§ 811.2, 815. Respondents and their *amicus* rely (Resp. Br. 33-35; Hunter Br. 5-6) on provisions of State law that exempt the University from procedures for presenting tort claims that apply to other State agencies. *See id.* §§ 900.6, 905.6, 943, 965.9. According to respondents

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[12] *In re Holoholo*, 512 F. Supp. 889, 895 (D. Haw. 1981), relied on by respondents, affords no support for their approach. In *Holoholo*, the court held that the University "is the state for purposes of the Eleventh Amendment," but (erroneously) found a contractual waiver of Eleventh Amendment immunity.

(Resp. Br. 35), these provisions show that the University should be treated "the same as a private corporation" for Eleventh Amendment purposes. But the fact that the University, unlike other State agencies, is exempt from the requirements that tort claims must be presented to the State Controller, and paid only upon a warrant issued by the Controller, reflects the University's special status as a co-equal branch of State government. As the comments to the provisions explain, they merely "codif[y] existing law as declared by two trial court decisions which, the Commission is advised, held that neither the State nor the local public entity claims presentation procedures apply to claims against the University of California." *Id.* § 905.6 (comment).[13] *Cf. id.* § 925.2 (exempting claims for expenses of members of the State Legislature from claims presentation procedure).

The cases that respondents cite concern the applicability of particular State laws to the University, not whether it is protected by sovereign immunity. In *Regents of the University of California v. Superior Court*, 551 P.2d 844, 846 (Cal. 1976) (*en banc*), for example, which held that the University is subject to State usury laws in managing its endowment fund, the court applied a general rule that "governmental agencies" — including State agencies — are excluded "from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers." By contrast, in *San Francisco Labor Council v. Regents of the University of California*, 608 P.2d 277 (Cal. 1980) (*en banc*), the court held that a State prevailing wage law does not apply to the University. The

[13] *See Regents of the Univ. of Cal. v. January*, 6 P. 376 (Cal. 1885) (State treasurer required to deliver funds deposited in the State treasury upon presentation of resolution of the Regents, "without requiring, in addition thereto, a warrant of the comptroller."); *Regents v. Dunn*, 6 P. 377 (Cal. 1885) (same).

court, which repeatedly referred to the University as a "state agenc[y]," reasoned that "[t]he Regents have the general rule-making or policy-making power in regard to the University" under the State's Constitution, and therefore have a "general immunity from legislative regulation." *Id.* at 278 (citations omitted).[14]

Respondents also argue (Resp. Br. 35) that the University is equivalent to a county or city, and therefore not entitled to Eleventh Amendment immunity. The short answer is that California law expressly distinguishes the University from counties and cities, *see* Cal. Govt. Code § 3202 ("'State agency' means every state office, department, division, bureau, board, commission, superior court, court of appeal, the Supreme Court, the California State University, the University of California, and the Legislature."; "'Local agency' means a county [or] city . . . ."), and many provisions of California law expressly define the University as a State

[14] *Regents of the University of California v. Aubry*, 49 Cal. Rptr. 2d 703, 708 (Cal. Ct. App. 1996), simply followed *San Francisco Labor Council*. *Royer's Estate*, an early case, concluded (56 P. at 463) that the University, although "a governmental agency" and an "instrumentality of the state," is subject to the State's probate laws. Respondents also cite *Moores v. Walsh*, 45 Cal. Rptr. 2d 389, 390 (Cal. Ct. App. 1995), apparently because it notes in passing that real property was conveyed from the State to the Regents. Although the Regents may hold title to property of the University, all University property is property of the State. *See Royer's Estate*, 56 P. at 463. Finally, *Regents v. Public Employment Relations Board*, 485 U.S. 589, 591 (1988), has nothing to do with the status of the University. The issue was whether delivery of unstamped letters from a labor union to university employees violates Private Express Statutes. The same type of suit could have been brought if any branch or agency of the California government had delivered unstamped letters to its employees.

agency.[15] In *Moor v. County of Alameda*, 411 U.S. 693 (1973), which held that California counties are citizens of California for purposes of federal diversity jurisdiction, the Court found it "significant[]" that a county, unlike the University, "is deemed to be a 'local public entity' in contrast to the State and state agencies." *Id.* at 719, *citing* Cal. Govt. Code § 940.4. In addition, the Court noted that a county, unlike the University, is "authorized to levy taxes to pay . . . judgments" against it. *Id.* Finally, members of a county's governing body are not chosen in state-wide elections or appointed by the Governor.

In sum, the treatment of the University under State law and in State court decisions is fully consistent with the University's position as an arm of the State for Eleventh Amendment purposes.

B. The University Has Not Waived Eleventh Amendment Immunity.

Respondents contend (Resp. Br. 29-32) that the University has waived Eleventh Amendment immunity by entering into the DOE contract and by "freely submitt[ing] to discovery for almost one year." Resp. Br. 31. The Court of Appeals did not reach this issue, *see* J.A. 18a; in any event, it lacks merit. A waiver of Eleventh Amendment immunity will be found

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[15] *See, e.g.*, Cal. Govt. Code §§ 19994.30(c), 13332.11(a), 8790.20(g); 8680.8, 8547.2(d), 6901, 4475, 3202; Cal. Bus. & Prof. Code § 11010.6; Cal. Food & Agric. Code §§ 74195, 74695, 74995, 75655, 78004; Cal. Health & Safety Code 16104; Cal. Pub. Cont. Code, ch. 2.1; 63 *Ops. Cal. Atty. Gen.* 132 (1980). *Cf.* Cal. Govt. Code § 11346.3(b)(2) (excluding the University, the courts, and agencies in the judicial or legislative branch of state government); *id.* § 11346.54 (same); *id.* § 11011.13 (excluding the University, the Legislature, and the Department of Transportation). *See also Regents v. Superior Court of Los Angeles County*, 476 P.2d 457, 464 n.14 (Cal. 1970) (*en banc*) (Board of Regents does not "occupy a position analogous" to that of a county).

"only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). The University-DOE contract plainly does not meet that demanding standard. To the contrary, the University's limited agreement not to assert an immunity defense "[i]n the event of a nuclear incident," J.A. 72a, clearly implies that it has *not* waived Eleventh Amendment immunity in this case. It is also well-established that Eleventh Amendment immunity is a jurisdictional issue that can be raised at any point in the litigation. *Edelman*, 415 U.S. at 677-78.

C. Doe May Not Pursue An Action For Damages Against Petitioner Nuckolls In His Official Capacity.

Finally, Doe argues (Resp. Br. 47-48) that his claim against Petitioner Nuckolls in his official capacity may proceed "independent of the Eleventh Amendment issue." The Court of Appeals' ruling that the Section 1983 claim against Petitioner Nuckolls could go forward was based solely on its conclusion (J.A. 19a) that the University is not entitled to Eleventh Amendment immunity in this case. Accordingly, if the Court holds that the University is entitled to Eleventh Amendment protection, the Court of Appeals' ruling on the Section 1983 claim against Petitioner Nuckolls should also be reversed. Although the Court of Appeals did not reach Doe's contention that he is seeking "prospective injunctive relief," J.A. 19a, the District Court correctly rejected that contention on the ground that Doe's Section 1983 claim "relates solely to an alleged past violation of federal law," J.A. 34a-35a (quotation omitted). *See Papasan v. Allain*, 478 U.S. 265, 278-79 (1986).

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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(8)

No. 95-1694

In the Supreme Court of the United States

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN DOE, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a state instrumentality that would otherwise be immune from suit under the Eleventh Amendment as an arm of the State loses its Eleventh Amendment immunity because the federal government may be contractually obligated to bear the cost of an adverse judgment against it.

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INTEREST OF THE UNITED STATES

This is a suit against a state university that operates a federally-owned nuclear research laboratory pursuant to a contract with the United States Department of Energy. The decision of the court of appeals withholds Eleventh Amendment immunity from the university on the basis of an indemnity provision in the contract. The United States has a substantial interest in the effect of its contractual arrangements on the amenability of States and their instrumentalities to suit in the federal courts.

STATEMENT

1. Since the establishment of the Manhattan Project during the Second World War, the federal government has owned facilities for nuclear weapons production and nuclear research and development. In 1946, Congress placed ownership and control of the government's nuclear facilities in the Atomic Energy Commission. See Atomic Energy Act of 1946, ch. 724, §§ 4(c), 9(a), 60 Stat. 759, 765. In 1975, responsibility for the government's nuclear facilities was transferred to the Energy Research and Development Administration and, in 1977, to the Department of Energy (DOE), which remains responsible for them today. See Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565. Several laboratories and other facilities owned by DOE currently carry out nuclear research, development, and weapons activities. H.R. Rep. No. 499, 103d Cong., 2d Sess. 340-341 (1994) (1994 House Report).

Although owned by the federal government, these facilities are operated by private and public contractors, which are responsible for the day-to-day management of the facilities and employment of the personnel who work at them. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 176, 180-181 & n.2 (1988); *United States* v. *New Mexico*, 455 U.S. 720, 722-723 n.1 (1982); *United States* v. *Boyd*, 378 U.S. 39, 47 (1964); United States General Accounting Office, *High-Risk Series: Department of Energy Contract Management* 11-12 (1992) (GAO Report).

Contractors operate DOE's nuclear facilities pursuant to management and operating (M&O) contracts.

See *Boyd*, 378 U.S. at 47; O.S. Hiestand, Jr. & Mark J. Florsheim, *The AEC Management Contract Concept*, 29 Fed. Bar J. 67, 68-74 (1969); 48 C.F.R. Pt. 970. M&O contracts "are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities." *New Mexico*, 455 U.S. at 723; Hiestand & Florsheim, 29 Fed. Bar J. at 68. M&O contracts give contractors considerable discretion in the operation of DOE's facilities: "While subject to the general direction of the [federal] Government, the contractors are vested with substantial autonomy in their operations." *New Mexico*, 455 U.S. at 723; *Boyd*, 378 U.S. at 42, 48; H.R. Rep. No. 1006, 101st Cong., 2d Sess. 206 (1991) (1991 House Report) ("In deference to the contractors' expertise, the DOE and its predecessor agencies have consistently followed a 'least interference' approach toward the operation of their nuclear facilities."); GAO Report at 11. Thus, while DOE nuclear facilities are immune from direct state regulation in the absence of Congressional authorization, see *Goodyear Atomic Corp.*, 486 U.S. at 180-181, the contractors who operate them "cannot be termed 'constituent parts' of the Federal Government," and do not enjoy federal sovereign immunity. *New Mexico*, 455 U.S. at 740; *Boyd*, 378 U.S. at 47.

The federal government has assumed financial responsibility for virtually all of the costs incurred by contractors in connection with their operation of DOE's nuclear facilities. See GAO Report at 25; H.R. Rep. No. 1095, 102d Cong., 2d Sess. 169 (1992) (1992 House Report); 1991 House Report at 206. M&O contracts provide that DOE will pay a contractor's "allowable costs" and, with limited specified exceptions, all costs incurred by the contractor in connec-

tion with its work have traditionally been deemed allowable. See 48 C.F.R. 970.5204-13; Hiestand & Florsheim, 29 Fed. Bar J. at 75. Contractor costs generally are paid through an "advanced funding" mechanism (see 48 C.F.R. Subpt. 970.32), that "allows contractors to pay creditors and employees with drafts drawn on a special bank account in which United States treasury funds are deposited." *New Mexico*, 455 U.S. at 725-726. The contractor pays its expenses by drawing on the account, while the federal government retains ownership of the account balance. *Id.* at 726.

As a general matter, the costs of legal judgments against contractors arising out of the operation of DOE facilities are treated as allowable costs under M&O contracts. See 48 C.F.R. 970.5204-13(d)(4) and (5), 970.5204-31; Hiestand & Florsheim, 29 Fed. Bar J. at 98; 1991 House Report at 206-207. The government's contractual obligation to pay for judgments against DOE contractors historically has been subject only to "very narrow, and infrequently invoked, conditions" (1991 House Report at 207). DOE is, however, in the process of modifying its M&O contracts in order to place greater responsibility on contractors for costs associated with legal liabilities to third parties. See 61 Fed. Reg. 32,588 (1996) (discussing proposed amendments to Department of Energy Acquisition Regulation to revise M&O contracts and to reflect "performance-based management contracting" principles).[1]

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[1] M&O contracts may also contain special indemnification provisions relating to liabilities arising out of nuclear incidents. See 48 C.F.R. Subpt. 950.70, 952.250-70. Under Section 170 of the Atomic Energy Act of 1954, as amended, Pub. L. No. 100-408, 102 Stat. 1066, commonly referred to as the Price Anderson Act, DOE is required to indemnify its contractors against liabilities arising out of such incidents without regard to a contractor's fault. See 42 U.S.C. 2210(d). The indemnification provisions of Section 170(d) are incorporated into the terms of all M&O agreements in which contractors are at risk of liability for a nuclear incident. See also note 12, *infra*.

2. Lawrence Livermore National Laboratory (Laboratory) is one of DOE's nuclear research and development laboratories. Since its creation in 1952, the Laboratory has been operated by petitioner Regents of the University of California (University) pursuant to a regularly renewed M&O contract.[2] The University is established by the California Constitution as a public corporation and entitled to support "[f]rom all state revenues." Cal. Const. Art. IX, § 9(a); *id.* Art. XVI, § 8(a). Under California law, the University is characterized as "a constitutional department * * * of the state government" (*Hamilton* v. *Regents of the Univ. of California*, 293 U.S. 245, 257 (1934)), "a constitutionally created arm of the state" (*Regents of the Univ. of California* v. *City of Santa Monica*, 143 Cal. Rptr. 276, 279 (Ct. App. 1978)), and "a statewide administrative agency" (*Ishimatsu* v. *Regents of the Univ. of California*, 72 Cal. Rptr. 756, 763 (Ct. App. 1968)).

The current contract between DOE and the University for the operation of the Laboratory states that, "WHEREAS, the University * * *, as a nonprofit organization, has managed the Lawrence Livermore National Laboratory * * * as a public

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[2] The University also has managed and operated two other DOE nuclear facilities under M&O contracts, the Los Alamos National Laboratory in New Mexico, and the Lawrence Berkeley National Laboratory in California.

service to the nation, for no loss or gain, * * * the federal government provides a general indemnification of the University against liability." See Contract Between the United States of America and the Regents of the University of California (Docket Entry 59) [hereinafter Contract, Art. I]. Under the contract, DOE is required to "indemnify and hold the University harmless against any delay, failure, loss or damage, judgment, or liability * * * arising out of or connected with the [contract] work" unless "any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract." *Id.* Art. XVII, Cl. 4(b).[3] The contract further provides that "[t]he obligations of DOE under this [indemnity] clause * * * shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress." *Id.* Cl. 4(d). The University's allowable costs under the contract are paid through the advanced funding mechanism generally used in M&O contracts. *Id.* Art. VII, Cl. 3. In addition, the contract provides that "[t]he Government shall pay directly and

[3] Allowable costs and unallowable costs are enumerated elsewhere in the contract. See Contract, Art. VII, Cl. 1(d) and (e). Under these provisions, judgments and settlements, as well as litigation defense costs, generally are treated as allowable costs under the contract. *Id.* Cl. 1(d)(4); see also *id.* Art. XVII, Cl.1.

discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University." *Id.* Art. XVII, Cl. 4(c). DOE has not determined whether or not it is contractually obligated to pay the costs of any judgment that may be entered against the University in this case.

3. This case arises out of an employment dispute between the University and respondent John Doe. Doe, a mathematical physicist and a citizen of New York, alleges that in 1991 the Laboratory improperly withdrew an offer of employment because the Laboratory determined that Doe would not be able to obtain a required security clearance from DOE.

Doe filed suit in the District Court for the Northern District of California in 1992. He named as defendants the University; the University's president; the Laboratory; petitioner John Nuckolls (the director of the Laboratory); and several federal defendants, including DOE and the Secretary of Energy. Doe's claims against the federal defendants were dismissed with prejudice pursuant to a stipulation between the parties, and the claims against the president of the University also were dismissed by the district court. See Pet. App. 3a n.1, 4a. The Laboratory remains a named defendant but, as Doe acknowledged below, the Laboratory is a physical installation that is not subject to suit as a separate legal entity. As a result, the only relevant remaining claims are those against the University and Nuckolls.

Doe asserted claims against the University and Nuckolls under California common law and 42 U.S.C. 1983. Doe's common law claim asserted that the University committed a breach of contract by failing to honor the Laboratory's initial offer of employment.

First Amended Compl. ¶¶ 13-15.[4] Doe's Section 1983 claim asserted that the University and Nuckolls violated Doe's rights under the Due Process Clause because Doe's eligibility for a security clearance was not determined by DOE pursuant to its regulations. *Id.* ¶¶ 16-19. Doe asked the district court to order the University and Nuckolls to employ him in accordance with his employment contract, and to award damages against the University and Nuckolls for back pay and lost benefits. *Id.* at p. 6.

The University and Nuckolls moved to dismiss Doe's Section 1983 claim. Among other things, they asserted that they are immune from suit under the Eleventh Amendment as an "arm of the State," and hence are not "persons" within the meaning of Section 1983 under *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989). The district court granted the motion to dismiss the Section 1983 claim against the University, agreeing that the University is an arm of the State for Eleventh Amendment purposes and therefore is not a proper Section 1983 defendant under *Will*. Pet. App. 28a. For the same reason, the district court dismissed the Section 1983 claim against Nuckolls in his official capacity. Pet. App. 29a (citing *Will*, 491 U.S. at 70-71). The court declined to dismiss the Section 1983 claim against Nuckolls in his personal capacity. *Ibid.*

Doe subsequently filed a second amended complaint, which renewed his breach of contract and Section 1983 claims against the University and Nuckolls, and

[4] Doe initially included Nuckolls in the breach of contract claim, but that claim against Nuckolls was dismissed because Nuckolls was not a party to the alleged contract. See Pet. App. 27a n.5.

added class action allegations and sought prospective injunctive relief on behalf of the class. Second Amended Compl. ¶¶ 14-16 & p. 7. The University and Nuckolls again moved to dismiss the Section 1983 claims, and the University moved to dismiss the contract claim on the basis of the Eleventh Amendment.

The district court dismissed the Section 1983 claims against the University and Nuckolls in his official capacity on the basis of the court's earlier dismissal ruling. Pet. App. 22a-24a.[5] The court also dismissed the breach of contract claim against the University, relying on the court's earlier ruling that the University is an "arm of the State" for Eleventh Amendment purposes. *Id.* at 24a. The district court then granted a motion by Doe for entry of a separate judgment regarding the dismissed claims under Fed. R. Civ. P. 54(b), and Doe filed a timely appeal. Pet. App. 5a, 19a.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-11a. The majority noted that, although the Eleventh Amendment bars suits in federal courts in which a "state or 'arm of the state' is a defendant," an "entity could be organized or managed in such a way that it does not qualify as an arm of state entitled to sovereign immunity." *Id.* at 6a (quotation omitted). The court then applied "a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state," and observed that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the

[5] The district court did not dismiss the claims on behalf of the putative class against Nuckolls in his official capacity. Pet. App. 24a n.2; see *Will*, 491 U.S. at 71 n.10.

state." *Id.* at 6a-7a. The court concluded that this factor "weighs against granting the University Eleventh Amendment immunity from suit in federal court" because the University's "[c]ontract makes clear that [DOE] and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." Pet. App. 7a.[6] The court of appeals held that the district court erred in relying on previous Ninth Circuit precedent holding that the University was an arm of the State, because the five-factor test yields a different conclusion when applied to "this unique situation in which [DOE], and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory." *Id.* at 8a-9a. The court concluded that because "the University, in this particular instance, is not functioning as an arm of the state" and "Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a 'person' who is fully liable under § 1983," Doe could bring his breach of contract and Section 1983 claims in federal court. *Id.* at 10a-11a. Because it held that the University is not an arm of

[6] The court of appeals relied on the current contract between the University and DOE. Pet. App. 3a. Technically, DOE's obligations in this case are not governed by the current contract, because its provisions do not apply to costs arising from events occurring prior to the date of the contract's execution on November 20, 1992. See Contract, Art. XVIII, Cl. 3(b). The allowability of pre-1992 costs, such as those at issue in this case, is governed instead by the provisions of the prior M&O contract which was executed in 1987. *Ibid.* The 1987 contract is not a part of the record of this case. For present purposes, however, there appear to be no material differences between the 1987 contract and the current contract.

the State, the court found it unnecessary to determine "whether the University has waived or Congress has abrogated the University's [Eleventh Amendment] immunity." *Id.* at 10a.

Judge Canby dissented. Pet. App. 11a-14a. He saw the Eleventh Amendment analysis as straightforward: "If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived." *Id.* at 12a. In his view, the critical Eleventh Amendment question "is not who pays in the end," but rather "who is legally obligated to pay the judgment that is being sought." *Id.* at 14a. Here, it is undisputed that a judgment against the University is "a legal obligation of the State of California," and the fact that the University might have a contractual right to shift the cost of the judgment to the federal government "does not affect [the State's] primary liability for the judgment." *Id.* at 13a. Judge Canby also noted that, although "there is a relatively clear indemnity agreement," the United States nonetheless might have defenses to indemnity in this or other cases. He asked: "Must we assess the State's likelihood of success [in seeking indemnity] in order to decide the Eleventh Amendment question?" *Id.* at 14a.

SUMMARY OF ARGUMENT

Until the decision below, the University consistently had been considered an arm of the State immune from suit under the Eleventh Amendment. In this case, the court of appeals held that the University lost that status because its contract with the federal government shields the state's fisc from the impacts of an adverse judgment. That conclusion can-

not be reconciled with this Court's Eleventh Amendment jurisprudence.

A State's dignitary interest in immunity from suit requires that the Eleventh Amendment inquiry turn on whether a state entity is the party against whom judgment is sought. When judgment is sought against a state entity it is irrelevant whether the State ultimately has a contractual right of indemnity or reimbursement from a third party. In this case, there is no question that an adverse judgment would be a legal liability of the University, a state entity. The contractual provisions that shift the economic impact of the University's legal liability to the federal government do not change the fact that the State has been sued.

Viewed purely in practical terms, the court of appeals' analysis is also incorrect. The decision below would make Eleventh Amendment immunity dependent on contractual issues that a district court could not readily resolve. If the Eleventh Amendment is to function properly, a court must be able to determine its applicability at the outset of a case. Under the court of appeals' ruling, however, applicability of the Eleventh Amendment turns on a case-specific determination whether the state entity has legal recourse against a third party to satisfy a judgment. This factual question generally will be unresolved prior to a full presentation of the evidence, and the availability of such recourse ultimately will depend in part upon the actions of a party that is not before the court.

ARGUMENT

A STATE INSTRUMENTALITY'S CONTRACTUAL RIGHT TO INDEMNIFICATION FROM THE FEDERAL GOVERNMENT DOES NOT ALTER ITS STATUS AS AN ARM OF THE STATE UNDER THE ELEVENTH AMENDMENT

1. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." By virtue of the Eleventh Amendment, a State may not be sued by individuals in the federal courts unless the State has waived its immunity or Congress has abrogated that immunity pursuant to a valid grant of constitutional authority. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1122 (1996); *Will*, 491 U.S. at 66; *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985).[7]

Under the "arm of the State" doctrine, the immunity conferred on the States by the Eleventh Amendment extends to agencies and other instrumentalities of the States. See, *e.g.*, *Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (*PRASA*); *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978) (per curiam); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 400-401 (1979); *Mt. Healthy City School Dist. Bd. of Educ.*

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[7] The Eleventh Amendment does not restrict the jurisdiction of the federal courts over suits by the United States. See, *e.g.*, *Seminole Tribe*, 116 S. Ct. at 1131 n.14 ("the Federal Government can bring suit in federal court against a State"); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782, 783 (1991); *United States* v. *Texas*, 143 U.S. 621, 644-645 (1892).

v. *Doyle*, 429 U.S. 274, 280 (1977); *Ford Motor Co.* v. *Department of the Treasury of Indiana*, 323 U.S. 459 (1945). In this case, petitioners seek dismissal of the claims against them on the ground that the University is an arm of the State of California for Eleventh Amendment purposes and hence is immune from suit in the federal courts.

This Court has never decided whether any particular state university is an arm of its State for Eleventh Amendment purposes.[8] However, the Court has decided that an order issued by the Regents of the University of California reflects an exercise of "state law-making power" sufficient to render that order a "statute of [a] state." *Hamilton*, 293 U.S. at 258. Moreover, the lower federal courts have held repeatedly that state universities are entitled to Eleventh Amendment immunity as arms of the State.[9]

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[8] *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) was a Section 1983 suit against the University of Florida. The Court declined to decide whether the university was immune from suit under the Eleventh Amendment because the issue had not been directly raised. 457 U.S. at 515-516 n.19. In separate opinions, three members of the Court addressed the Eleventh Amendment issue. Chief Justice Burger and Justice Powell concluded that the university was protected by the Eleventh Amendment, while Justice White concluded that the university's Eleventh Amendment immunity had been waived by Florida. See *id.* at 519 n.* (White, J., concurring in part and concurring in the judgment); *id.* at 529-531 (Powell, J.,).

[9] See, *e.g.*, *Hutsell* v. *Sayre*, 5 F.3d 996 (6th Cir. 1993), cert. denied, 114 S.Ct. 1071 (1994); *Lassiter* v. *Alabama A & M Univ.*, 3 F.3d 1482 (1993), aff'd in part, rev'd in part on other grounds on reh'g en banc, 28 F.2d 1146 (11th Cir. 1994); *Kaimowitz* v. *Board of Trustees*, 951 F.2d 765 (7th Cir. 1991); *Dube* v. *State Univ. of New York*, 900 F.2d 587 (2d Cir. 1990), cert. denied, 501 U.S. 1211 (1991); *Richard Anderson*

Until this case, the Ninth Circuit consistently had held that the University of California constitutes an arm of the State of California for Eleventh Amendment purposes. See, *e.g.*, *Thompson* v. *City of Los Angeles*, 885 F.2d 1439, 1443 (1989); *BV Engineering* v. *Univ. of California*, 858 F.2d 1394, 1395 (1988), cert. denied, 489 U.S. 1090 (1989); *Jackson* v. *Hayakawa*, 682 F.2d 1344, 1350 (1982); see also *Mascheroni* v. *Board of Regents of Univ. of California*, 28 F.3d 1554, 1559 (10th Cir. 1994) (same); *Vaughn* v. *Regents of Univ. of California*, 504 F. Supp. 1349, 1352-1354 (E.D. Cal. 1981) (same). The court of appeals here departed from those precedents primarily because of its conclusion that DOE has an obligation under the M&O contract to bear the cost of any judgments against the University arising out of the University's operation of the Laboratory.[10] The court's reasoning and holding are incorrect.

a. The decision below assumes that Eleventh Amendment concerns are implicated only by the imposition of financial liability on state treasuries. That assumption is directly contrary to this Court's

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Photography v. *Brown*, 852 F.2d 114 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); *Rutledge* v. *Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), aff'd, 460 U.S. 719 (1983); *Jagmandan* v. *Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977); *Prebble* v. *Broadrick*, 535 F.2d 605 (10th Cir. 1976).

[10] The court of appeals posed the question before it as whether a state entity is no longer an arm of the State when a judgment against the entity is paid from sources other than the State's treasury. Under the reasoning of the decision below, however, the State of California presumably would not be immune if DOE had contracted directly with it to manage the Laboratory, because the State's revenues would not be tapped to pay the judgment.

Eleventh Amendment jurisprudence. In *Seminole Tribe*, the Court held that: "The Eleventh Amendment does *not* exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury'." 116 S. Ct. at 1124 (emphasis added). The notion that the Eleventh Amendment serves "merely [as] a defense to liability" "misunderstands the role of the Amendment in our system of federalism: 'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *PRASA*, 506 U.S. at 145, 146 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); *Seminole Tribe*, 116 S. Ct. at 1124. Accordingly, in *PRASA*, the Court held that states are entitled to appeal immediately from denials of motions to dismiss on Eleventh Amendment grounds in order to "ensur[e] that the States' dignitary interests [under the Eleventh Amendment] can be fully vindicated." 506 U.S. at 146.

Because the Eleventh Amendment is designed primarily to vindicate the States' dignitary interests in the federal system, "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 116 S. Ct. at 1124; *PRASA*, 506 U.S. at 146. As this Court observed in *Cory* v. *White*, 457 U.S. 85 (1982), the Eleventh Amendment by its terms applies to suits seeking injunctive relief, as well as to suits seeking damages. 457 U.S. at 91. The Court noted that "[i]t would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to

enjoin the State itself simply because no money judgment is sought." *Id.* at 90.[11]

These principles apply with equal force when a litigant sues an arm of the State. See *PRASA*, 506 U.S. at 146 ("suits against the States *and their agencies* * * * are barred regardless of the relief sought") (emphasis added). For example, in *Alabama* v. *Pugh*, *supra*, prisoners sued the State of Alabama, the Alabama Board of Corrections, and several state officers for injunctive relief relating to the prisoners' conditions of confinement. The Court held that the Eleventh Amendment provided immunity from suit, not only to Alabama, but to the Board of Corrections as well. 438 U.S. at 781-782. The fact that the prisoners were not seeking damages from the Board of Corrections, and hence that the judgment would not subject the state treasury to retrospective financial liability, did not affect the Board's immunity from suit. Accord, *Atascadero State Hospital*, 473 U.S. at 237-247 (state hospital and state Department of Mental Health are immune from suit for injunctive relief as well as damages).

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[11] In contrast, when a litigant sues an individual state officer in his or her official capacity, the relief does affect the Eleventh Amendment analysis. While a suit against a state official seeking retrospective monetary relief that "must inevitably come from the general revenues of the State" is barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), under *Ex parte Young*, 209 U.S. 123 (1908), a suit against the official seeking prospective injunctive relief on the basis of federal law is not deemed a suit against the State for Eleventh Amendment purposes. See, *e.g.*, *PRASA*, 506 U.S. at 145. The *Ex parte Young* doctrine "has no application in suits against the States and their agencies." 506 at 146; *Blatchford*, 501 U.S. at 785 n.3.

The decision below cannot be reconciled with these Eleventh Amendment principles. The court of appeals did not repudiate its prior decisions holding that the University is ordinarily an arm of the State under the Eleventh Amendment. Instead, the court held that the University loses that status when, by virtue of a contractual indemnification provision, the United States will be liable to reimburse the University for any monetary judgment against it. Despite that provision, however, the University remains subject to suit and any judgment rendered in such a suit will be rendered against the University, which will be responsible for its satisfaction. In those circumstances, the indemnification provision does not change the University's status as an arm of the State for Eleventh Amendment purposes.[12]

[12] Congress has legislated on the assumption that state entities that are indemnified under contract with DOE do not automatically lose their governmental immunity. The Price Anderson Act, 42 U.S.C. 2210, requires DOE to enter into agreements of indemnification with contractors performing work involving risk of liability to third parties arising out of nuclear incidents. See also note 1, *supra*. The Act further authorizes DOE to incorporate into such indemnification agreements "provisions relating to the waiver of any issue or defense as to * * * governmental immunity." 42 U.S.C. 2210(d)(1)(B)(ii). The current contract between DOE and the University contains a "nuclear hazards indemnity" provision that requires the University to waive governmental immunity in cases arising out of nuclear incidents. Contract, Art. XVII, Cl. 2(e)(1). Had Congress understood that the federal indemnity would itself render States and their instrumentalities subject to suit in the federal courts, the provision authorizing DOE to require a State to waive its immunity in cases involving nuclear accidents would have been superfluous.

b. The financial responsibilities of a State's instrumentalities are not wholly irrelevant for Eleventh Amendment purposes. In determining whether particular entities are arms of States under the Eleventh Amendment, this Court has relied, *inter alia*, on the extent to which a State is legally responsible for the cost of judgments against the entity in question. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 403-406 (1994); *Lake Country Estates*, 440 U.S. at 402.[13]

What this Court's precedents contemplate, however, is an inquiry into the legal relationship between the State and its instrumentalities in order to determine whether the instrumentality is an arm of the State or a separate entity for Eleventh Amendment purposes. See, *e.g.*, *Hess*, 115 S. Ct. at 403-406. Here, it is undisputed that money judgments against the University are legal obligations of the State of California and ordinarily are satisfied out of state revenues. See Pet. App. 13a (Canby, J., dissenting); *Vaughn*, 504 F. Supp. 1349, 1353 ("any judgment obtained * * * against the Regents will have to be paid out of the *state* treasury or other sources of *state* funds"). If Doe obtains a judgment for damages against the University, the University will be legally responsible to Doe for that judgment. Although the cost of such a judgment ultimately may be borne by DOE pursuant to the terms of the M&O contract, the contractual arrangements between DOE and the

[13] *Hess* and *Lake Country Estates* involved claims of Eleventh Amendment immunity by multi-state entities created pursuant to the Compact Clause. In contrast to suits against an arm of an individual State, suits against Compact Clause entities are not considered to affect the dignitary interests of the participating States. *Hess*, 115 S. Ct. at 400-402.

University do not alter the University's legal obligation to Doe. Doe would be entitled to have the judgment paid by the University, and Doe could invoke the coercive powers of the district court against the University and its assets if payment were not forthcoming.[14] Doe could not enforce such a judgment against DOE, nor could he bring suit against DOE for any failure to provide the University with the funds required to pay the judgment. See Pet. App. 13a (Canby, J., dissenting) ("Doe, if he wins his case, must execute his judgment against the State, not the United States.").[15]

Because the University is legally liable for a judgment in this case, the fact that the cost of such a judgment ultimately may be borne by DOE is irrelevant for Eleventh Amendment purposes. As explained above, the Eleventh Amendment is concerned not only with protecting state treasuries from financial liability imposed by federal courts, but also with "'prevent[ing] the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *PRASA*, 506 U.S. at 146 (quoting

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[14] The same result follows with respect to Doe's Section 1983 claim against petitioner Nuckolls in his official capacity. See *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("a judgment against a public servant 'in his official capacity' imposes a liability on the entity that he represents"); accord *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985).

[15] The current contract provides that "[n]othing contained in this contract, or its amendments, shall be construed to grant, vest, or create any rights in any person not a party to this contract." Contract, Art. XVIII, Cl. 2. The same provision was included in the preceding contract (see note 6, *supra*).

Ayers, 123 U.S. at 505. The prospect that DOE will bear the cost of a judgment in Doe's favor does nothing to forestall the threat to California's "dignitary interests" (*ibid.*) that this suit otherwise poses.[16]

Even viewed in strictly economic terms, the conclusion of the court of appeals is incorrect. As an economic matter, the indemnification provision in the M&O contract effectively provides the University with insurance against the risk of loss from claims arising out of the operation of the Laboratory. The cost of this insurance is reflected in the financial terms of the contract. See Contract, Art. V, Cls. 3-4 (fee provisions). In the absence of a right to seek indemnification by DOE, the University (like any other contractor) would require a larger management fee in order to cover the anticipated costs of future claims by third parties. See 61 Fed. Reg. at 32,588 (noting that rulemaking to increase contractors' accountability for costs will be complemented by future rulemaking addressing DOE's fee policies). The management fee that the University receives under the existing contract thus reflects a deduction

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[16] For the same reasons, there is no constitutional significance to the fact that DOE is obligated to "pay directly" any final judgments against the University (Contract, Art. XVII, Cl. 4(c)). Whether the University first must pay a judgment from its own funds and then seek reimbursement from DOE or is entitled to require DOE directly to satisfy the judgment is a matter solely between the University and DOE and does not change the status of the judgment as a legal liability of the University owed to Doe. In any event, an obligation to "pay directly" or "reimburse" has few, if any, practical consequences, because the University pays all allowable costs relating to the operation of the Laboratory by drawing directly on federal funds through the contract's "advance funding" mechanism (see p. 4, *supra*).

for what is essentially a premium payment by the University for the liability coverage provided by DOE.

The Ninth Circuit recognized this point in an earlier decision. *Markowitz* v. *United States*, 650 F.2d 205 (1981) (per curiam). In *Markowitz*, the court of appeals affirmed the dismissal on Eleventh Amendment grounds of a suit for damages against the University of Arizona. The plaintiffs argued, *inter alia*, that the Eleventh Amendment was not implicated because "any damages recovered by them will come from insurance carriers rather than the State of Arizona." 650 F.2d at 205. The court of appeals rejected that argument, pointing out that "[t]he source of any damages to which the [plaintiffs] might become entitled would be state funds even if paid by an insurance carrier," since "[s]uch carriers would pay only because of premiums paid by the state." *Id.* at 206. Noting that Arizona would not lose its Eleventh Amendment immunity through self-insurance, the court of appeals concluded that "Eleventh Amendment immunity should not be made to turn on whether or not the state is a self-insurer." *Ibid.* Precisely the same reasoning applies in this case. See Pet. App. 13a (Canby, J., dissenting).

2. The court of appeals' decision creates serious practical problems for the resolution of Eleventh Amendment immunity claims by state instrumentalities like the University. Rarely, if ever, will an arm of a State enjoy an unqualified contractual right to indemnification from the federal government or a private insurer. In this case, for example, DOE is not obligated to "indemnify and hold the University harmless against a[] * * * judgment or liability * * * arising out of or connected with" the operation

of the Laboratory if the liability is due to bad faith or willful misconduct by petitioner Nuckolls or a corporate officer of the University (Contract, Art. XVII, Cl. 4(b))[17] or if appropriated funds are not available (*id.* Cl. 4(d); cf. *Hercules Inc.* v. *United States*, 116 S.Ct. 981, 987-988 (1996)). The scope of DOE's contractual responsibility for judgments against its contractors, moreover, is likely to become significantly less comprehensive (see p. 4, *supra*). Under proposed amendments to the Department of

[17] Doe suggests (Br. in Opp. 5) that this exception does not apply to the government's obligation to "pay directly and discharge completely" final judgments under Clause 4(c) of Article XVII. That is incorrect. Clause 4(c) of Article XVII cannot be read in isolation from the immediately preceding terms of Clause 4(b), which establish the general obligation to pay for the "costs and expense of litigation and claims" and specify the limits on that obligation. See also Contract, Art. VII, Cl. 1(e)(17)(ii) (allowable costs do not include "losses or expenses * * * [that] [r]esult from willful misconduct or lack of good faith on the part of some officer or officers of the Regents of the University of California or any person acting as Laboratory Director."). Doe also argues (Br. in Opp. 5) that this exception does not apply because he alleges no bad faith or wilful misconduct. However, DOE's interpretation of the contract is not bound by the facts as alleged in the complaint.

In the event that a judgment is entered against the University, the allowability of that cost will be determined in the first instance by the DOE contracting officer responsible for the administration of the contract (see Contract, Art. V, Cls. 9-10) and ultimately will be subject to resolution under the Contract's "Dispute Clause" and the Contract Disputes Act, 41 U.S.C. 601 *et seq.* See Contract, Art. XVI, Cl. 3. Exclusive jurisdiction to review the contracting officer's decision would be vested in the Energy Board of Contract Appeals, the United States Court of Federal Claims, and the United States Court of Appeals for the Federal Circuit. 41 U.S.C. 606-607, 609; 28 U.S.C. 1295(a)(3) and (10).

Energy Acquisition Regulation (DEAR), contractors will bear the burden of demonstrating that liabilities were not caused by the "failure to exercise prudent business judgment by the contractor's managerial personnel." 61 Fed. Reg. at 32,601 (proposed amendment to DEAR 970.5204-31).

If a defendant's Eleventh Amendment status in a particular case were to depend on whether the federal government is contractually liable to the defendant for the cost of an adverse judgment, the district court would be required to determine the government's liability under the contract before it could resolve the Eleventh Amendment jurisdictional issue. If the dignitary concerns of the Eleventh Amendment are to be meaningful, that determination would be required to take place at the outset of the case, for "the value to the States of their Eleventh Amendment immunity * * * is for the most part lost as litigation proceeds past motion practice." *PRASA*, 506 U.S. at 145. It would be exceedingly difficult, however, for the court to resolve, at the outset of each case, the potentially complex and fact-intensive issues of indemnification coverage. That would be particularly true when those issues turn on matters like "good faith" and "prudent business judgment" that cannot be determined without a thorough understanding of the factual context of the case and the nature of plaintiff's claims. These difficulties would be compounded by the absence from the litigation of one of the two contracting parties, because the federal government would not be present to address the meaning of the contract and its view of its contractual obligations.

Under such a regime, the parties and the district court would often face insurmountable problems in reaching a reliable resolution of the Eleventh Amendment inquiry. In addition, under elementary principles of *res judicata*, a determination that the federal government is contractually obligated to provide indemnification would not be binding on the United States, which would not be a party to the suit in which that determination was made. In the event of an adverse judgment, the government would therefore be free to withhold payment if it concluded, contrary to the views of the district court, that payment was not required by the contract. As a result, a State might find itself compelled by a federal court to pay damages, yet simultaneously be unable to shift the cost of the judgment to the federal government—a result that would appear to be constitutionally impermissible under any view of the Eleventh Amendment.

In sum, the decision below is both doctrinally and practically misconceived. Whether a state entity constitutes an arm of the State for Eleventh Amendment purposes should not depend on an inquiry into whether the entity has made contractual arrangements for the federal government to pay the cost of an adverse judgment. If the relationship between the instrumentality and the State otherwise supports Eleventh Amendment immunity, the inquiry into the instrumentality's Eleventh Amendment status should be at an end.

3. In particular cases, questions regarding waiver and Congressional abrogation of immunity may remain to be resolved even after a court has determined that a suit is against a State or an arm of a State. This case does not present the Court with those issues. See generally *Atascadero State Hospital*, 473 U.S. at 241-247; *Florida Dep't of Health & Rehab. Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147,

150 (1981) (per curiam); *Edelman*, 415 U.S. at 673-674; *Parden* v. *Terminal Ry.*, 377 U.S. 184, 186 (1966). Because the court of appeals held that the University is not an arm of the State for Eleventh Amendment purposes, the court found it unnecessary to decide whether the University had waived its immunity from suit (Pet. App. 10a), and the issue of waiver is not presented by the petition for writ of certiorari.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1996

(9)

No. 95-1694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Petitioners,

v.

JOHN DOE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an entity, which otherwise would be considered part of the State or an arm of the state and thereby immune from suit in federal court under the Eleventh Amendment, may lose its immunity where it has a claim for reimbursement or indemnity from the federal government or other third party.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This

case raises an issue of fundamental importance to *amici* and their members—whether a state entity can be denied its Eleventh Amendment immunity from suit in federal court because the entity may receive indemnification from the federal government or other third parties for any judgment entered against it.

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. It serves a far broader purpose than merely protecting the state treasury from the impact of money judgments awarded by the federal courts. " 'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). It thus preserves a zone of federal court non-interference for the States in the administration of governmental functions by providing an immunity from suit and not just a defense to liability. *Id.*

The court of appeals' decision subverts this purpose by holding that the University of California, an entity which that court has previously recognized as being an arm of the state was not so in this case solely because it may be indemnified by a third party. Taken to its logical conclusion, this theory would subject state entities to federal court suits whenever an entity receives funds from a source other than the state treasury, with attendant discovery in every suit to determine the sources of the entity's funds. This would, of course, be wholly at odds with the Eleventh Amendment's purpose of providing the States with an immunity from suit in federal court.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioners' statement.

SUMMARY OF ARGUMENT

1. The Ninth Circuit has previously held that the University of California is an arm of the state which is entitled to Eleventh Amendment immunity. *See, e.g., Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). The court nonetheless held that in this case the University is not entitled to Eleventh Amendment immunity because it may be indemnified by the United States for any money judgment entered against it.

The judgment below subverts the Eleventh Amendment and should be reversed. As this Court has made clear, "the Eleventh Amendment does not exist solely to prevent federal court judgments that must be paid out of a State's treasury." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996) (citations omitted). Rather, the Eleventh Amendment serves the greater purpose of protecting state autonomy by providing an immunity from suit in federal court. By allowing this suit to go forward, the court of appeals has subjected the State to the "coercive process[es]" of a federal court and the "indignity" of having to defend itself there against this suit. *In re Ayers*, 123 U.S. 443, 505 (1887). Its judgment thus violates the Eleventh Amendment.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

The court of appeals' holding is also highly problematic. Contrary to the court's view, it is not certain that the United States will pay any judgment awarded against the University. The indemnification clause specifically exempts the United States from paying damages caused by "bad faith or willful misconduct" of the University's officers. Pet. App. 36a. Given the nature of Doe's claims, it is possible that the United States would resist indemnification as outside the scope of the clause. Moreover, as required by the Anti-Deficiency Act, 31 U.S.C. § 1341, the United States' obligation is contingent on Congress appropriating sufficient funds. There is thus a very real possibility that the State itself, which remains legally liable for any judgment, will be forced to pay the judgment.

The court of appeals' holding is also troublesome because it has no identifiable stopping point. Taken to its logical conclusion, it sanctions federal court suits against the States whenever (and discovery at the least to determine whether) a state entity has some source of funds other than the state treasury from which to pay a judgment. Moreover, the determination of whether a judgment will be paid by sources other than the state treasury will frequently require a high degree of speculation on the part of the federal courts. The very process of making this determination would, of course, eviscerate much of the Eleventh Amendment's principal purpose of providing the States with an immunity from suit in federal court. It also creates uncertainty; as this case illustrates, the same entity might retain its immunity in some cases but not in others. The court of appeals' indemnification rationale is untenable and its judgment should be reversed.

2. The court of appeals' opinion is no more persuasive if it is viewed more generally as setting forth numerous factors for determining whether an entity "is more like a county or city than it is like an arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The first of these factors, whether a judgment will affect the state treasury, is too inherently unworkable a criterion to provide probative guidance in determining whether an entity is an arm of the state. Moreover, because most States have longstanding constitutional limitations on the amount of their indebtedness, those important governmental programs which require large amounts of capital spending are generally carried out by authorities and corporations which are nominally independent of the State's executive department. These entities, however, do not in any sense resemble local governments which are not entitled to Eleventh Amendment immunity. To suggest that such entities are not entitled to Eleventh Amendment immunity because the State is technically not liable for any judgment is to ignore that they perform important governmental programs on behalf of the State and that any federal court judgment will affect the entity in its performance of these functions.

The court of appeals' multi-factor test for assessing whether an entity is an arm of the state is indeterminate and relies on criteria which are of little probative value. There are, for example, no judicially manageable standards for determining whether an entity is performing local as opposed to central government functions. The remaining factors, such as whether the entity has the power to sue and be sued, hold property, or has been given corporate status, do

not establish that an entity is not an arm of the state.

The determination of whether an entity "is more like a county or city than it is like an arm of the State" should instead focus on political control. Where the state government appoints a majority of an entity's governing officials, the entity is surely an arm of the state. Analyzed under the proper standard, the University of California is entitled to Eleventh Amendment immunity in this case.

ARGUMENT

THE UNIVERSITY OF CALIFORNIA IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY IN THIS CASE

Notwithstanding its prior precedents holding that the University of California is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court, *see Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *BV Engineering v. University of Cal., L.A.*, 858 F.2d 1394, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), the court of appeals concluded that these "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation." Pet. App. 9a. This was so, the court reasoned, because "[s]tate liability for [a] money judgment is the single most important factor in determining whether an entity is an arm of the state." *Id.* at 7a. According to the court of appeals, this factor weighed against the "granting" of Eleventh Amendment immunity in this case because the University's contract with the United

States "makes clear that the Department, and not the State of California, is liable for *any* judgment rendered against the University in its performance of the Contract." *Id.* (emphasis added).

As explained below, the court of appeals' approach is both erroneous and unworkable. It threatens to expose not only traditional state entities (such as colleges, universities and turnpike authorities) but also more modern agencies (such as community development authorities) to suit in federal court even when such entities are under the control of, and are directly accountable to, the State. *See, e.g., Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991) (Wyoming Community Development Authority not an arm of the state). Indeed, if an entity's potential ability to obtain indemnification or reimbursement from a source other than the state treasury is to be the *sine qua non* of the Eleventh Amendment, it is inevitable that agencies which are unquestionably arms of the state will be subjected to suits for money damages in federal court whenever a plaintiff can point to some potential source of funds to pay a judgment, such as the federal government or an insurer. *See, e.g., Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir. 1989); *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

This approach subverts the Eleventh Amendment. It also has no basis in the Court's cases. *See Brown*, 459 U.S. at 1153 (White, J., dissenting from denial of certiorari). This alone justifies reversing the court of appeals. Moreover, the multi-factor test used by the court of appeals for assessing whether an entity is an arm of the state is indeterminate and relies

on criteria which are of no probative value. The Court should therefore instruct the lower federal courts that in determining whether a state-created entity is to be deemed an arm of the state for Eleventh Amendment purposes, or a political subdivision which is not, *see Lincoln County v. Luning*, 133 U.S. 529 (1890), the proper inquiry is whether the State possesses sufficient control over the entity. Not only is this test simple and workable—in contrast to the test employed by the court of appeals—its standard embodies the values of sovereignty which the States unquestionably retained in forming the Union. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1122 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-24 (1934); *The Federalist* No. 81, at 455 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

A. The Potential To Obtain Indemnification From The Federal Government Or A Third Party Is Irrelevant In Determining Whether An Entity Is An Arm Of The State

In holding that the University of California should not be deemed to be an arm of the state in this case, the court of appeals relied on its view that the University's contract with DOE "makes clear that the [DOE] and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract." Pet. App. 7a. Reasoning that "[s]tate liability for [a] money judgment is the single most important factor in determining whether an entity is an arm of the state," *id.*, the court concluded that the possibility that DOE

would indemnify the University in this case makes Eleventh Amendment immunity unavailable.

The court of appeals' holding is erroneous. It rests on an incomplete understanding of the purpose of the Eleventh Amendment. While the impact on a State's treasury is relevant in determining whether a suit nominally against an official is a suit against the State, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974), this Court has long recognized that the purpose of sovereign immunity is far broader than the protection of the state treasury from money judgments.

The text of the Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

By its express terms, the Eleventh Amendment precludes the exercise of federal court jurisdiction over any suit against a State regardless of whether the relief sought is legal or equitable in nature. Notwithstanding that the Eleventh Amendment was prompted by this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which upheld the exercise of federal jurisdiction over an action for money damages brought against a State, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury.'" *Seminole Tribe*, 116 S.Ct. at 1124 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394, 404 (1994)). Indeed, both the Amendment's text and a long line of cases make clear that it precludes the exercise of federal court jurisdiction over a suit against a State even when a money

judgment has not been sought. *See id.; see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-102 (1984); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933).

As this Court recently observed:

> [R]espondent's claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). It thus accords the States the respect owed them as members of the federation.

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); *see also Seminole Tribe*, 116 S.Ct. at 1124.

These authorities squarely refute the court of appeals' conclusion that the University is not entitled to Eleventh Amendment immunity in this case because it may be indemnified by the United States for any money judgment awarded. To even get to that point, the University will of course have been subjected to the "coercive process[es]" of a federal court and the "indignity" of having to defend itself there against this suit. *In re Ayers*, 123 U.S. at 505. In this respect alone, the court of appeals' decision does not "accord[] the States the respect owed them as members of the federation." *Puerto Rico Aqueduct*, 506 U.S. at 146.

Moreover, a money judgment for Doe will be a judgment enforceable against the University regardless of whether it ultimately obtains indemnification from the United States. As Judge Canby explained below:

> No one has disputed that a judgment against the University of California is a legal obligation of the State of California. . . . The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment.

Pet. App. 13a (Canby, J., dissenting). Contrary to the analysis of the court of appeals, the State is liable for any money judgment awarded Doe.

The court of appeals' suggestion that federal courts have the power to "grant" or deny the University its Eleventh Amendment immunity depending upon the function engaged in, *see* Pet. App. 9a, is also refuted by this Court's cases. Contrary to the view of the court of appeals, the Constitution does not vest in the federal courts authority either to "grant" or deny Eleventh Amendment immunity to what is unquestionably a state entity. Rather, when a state entity asserts that it is immune from suit in federal court—and here the federal courts have previously recognized the University's immunity from suit in federal court, *see Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395—the only questions for the court are whether the State has "specif[ied its] intention to subject itself to suit in *federal court*," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), or whether Congress, acting within its constitutional authority, has "abrogate[d] the States' constitutionally secured immunity from suit in federal court . . .

by making its intention unmistakably clear in the language of the statute." *Id.* at 242.

Accordingly, while the existence of a state entity's immunity from suit in federal court can vary depending upon the function involved, *see, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (upholding a federal court award of damages against a State under Title VII, 42 U.S.C. § 2000e *et seq.*), it is clear that this decision is for the States and/or Congress to make. Here, California has not waived its immunity from suit in federal court. Moreover, the relevant federal statute, 42 U.S.C. § 1983, does not abrogate California's Eleventh Amendment immunity. *See Edelman*, 415 U.S. at 674-77. To hold that the University is subject to suit in federal court amounts to no less than an end run around this Court's holdings in *Edelman* and *Atascadero*.

The court of appeals' indemnification theory is also fundamentally at odds with the Court's holding in numerous cases that a State's receipt of federal funds does not demonstrate that it has waived its immunity from suit in federal court. *See Atascadero*, 473 U.S. at 246-47 (Rehabilitation Act); *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 148-50 (1981) (per curiam) (Medicaid); *Edelman*, 415 U.S. at 671-74 (Social Security Act provisions for Aid to the Aged, Blind, or Disabled). The indemnification clause in the contract between the University and the United States stands on similar footing as the various federal programs at issue in these cases: while it suggests that the State has recourse in the event a money judgment is awarded against it, it does not manifest any intent

by the State to subject itself to suit in federal court. *See* Pet. App. 36a-37a. Of further note, in these cases, the respective State, through its participation in the federal programs would likely have been able to receive at least partial reimbursement for any award of damages against it. The Court did not, however, analyze the respective provisions of federal law to determine whether the State was likely to receive reimbursement. Indeed, such an approach—like that adopted by the court of appeals here—is incompatible with the nature of Eleventh Amendment immunity, which as the Court has recognized, is an immunity from suit and not just a defense to liability. *See Puerto Rico Aqueduct*, 506 U.S. at 145-46 & n.5.

The court of appeals' reliance on the possibility of indemnification is also highly problematic as a practical matter. Contrary to the view of the court of appeals, it is uncertain whether "the Department, and not the State of California, [will] pay[] any judgment rendered against the University in its management of the Laboratory." Pet. App. 9a. *See id.* at 14a (Canby, J., dissenting) ("In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity?"). The indemnification clause specifically exempts the United States from its obligation for damages "caused directly by bad faith or willful misconduct on the part of" the officers of the University or "any person acting as Laboratory Director." Pet. App. 36a. Given the nature of Doe's claims, it is certainly possible that in the event the University is adjudged liable, the United States will resist indemnification as outside the scope of the clause.

Moreover, consistent with the Anti-Deficiency Act, 31 U.S.C. § 1341, the contract's indemnification clause specifically provides that the United States' obligations "shall be subject to the availability of funds appropriated from time to time by Congress." Pet. App. 37a. While the United States has pledged its "best effort to obtain such funds" when they are not available, its obligation to pay is nonetheless contingent on Congressional approval. *Id.*

There is thus a very real possibility that the State itself will be forced to pay the judgment, a result which would violate even the Ninth Circuit's crabbed view of the Eleventh Amendment. Indeed, it is likely that in this case the obligation of the United States to indemnify the State cannot even be resolved in the same forum because under the Tucker Act, the United States Claims Court has exclusive jurisdiction over any suit by the State seeking more than $10,000. *See* 28 U.S.C. §§ 1346(a)(2); 1491(a)(1). A State's immunity from suit in federal court should not be dependent upon the speculative prospect of obtaining indemnification from third parties.

The court of appeals' reasoning also has no identifiable stopping point. For example, does the rule apply only when the federal government has promised to indemnify a State? Or does it sanction federal court suits against a State whenever (and discovery at the least to determine whether) a state entity has insurance or a contract with a third party requiring indemnification? For that matter, should it be taken to its logical conclusion to sanction suits against a state entity whenever it has a source of revenue—such as tuition payments—which is "independent" of the state treasury? *Cf. Brown v. Porcher*, 660 F.2d at 1007 (rejecting State's Eleventh Amendment defense in suit for workers compensation benefits, reasoning that fund receipts consisted of employer contributions).

Moreover, in adjudicating the State's Eleventh Amendment defense, is the federal court to conduct a hearing as to the financial soundness of the third party? Certainly an insolvency or bankruptcy on the part of the indemnifier would result in a financial impact on the state treasury as the plaintiff enforces the judgment against the State and the State is directed to file its claim in the respective proceedings. And are the federal courts to assess the likelihood of the State receiving indemnification under the contract in light of the indemnifier's likely defenses, even though the indemnifier may not be subject to the jurisdiction of the court? *Cf.* Pet. App. 14a (Canby, J., dissenting).

The very process of determining whether the state treasury will be affected by a potential judgment would eviscerate much of the Eleventh Amendment's principal purpose of providing the States with an immunity from suit in federal court. *See Puerto Rico Aqueduct*, 506 U.S. at 146. The court of appeals' approach also injects an extraordinary level of complexity into what should be a relatively simple and straightforward inquiry. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1055 (1995) (emphasizing adverse "practical consequences" in rejecting complex jurisdictional inquiry). Not only is it a poor use of scarce judicial resources, it will lead to unpredictable outcomes. Indeed, as this case demonstrates, the same entity might retain its immunity in some cases but not in others. The Eleventh Amendment immunity is too

important to the functioning of our federal system, *see, e.g., Seminole Tribe*, 116 S.Ct. at 1124, to be subjected to such uncertainty and manipulation.

Given that the Ninth Circuit has previously held that the University is an arm of the state, *see Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395, its reliance on the University's potential to receive indemnification is a remarkable basis upon which to conclude that it is not an arm of the state for purposes of this case. The Eleventh Amendment serves a greater purpose than simply shielding the state treasury from money judgments. Rather, it preserves a zone of federal court non-interference for the States in the administration of governmental functions. The University's potential entitlement to receive indemnification from outside the state treasury is irrelevant in determining whether it is an arm of the state.

B. The Ninth Circuit's Multi-Factor Test For Determining Whether An Entity Is An Arm Of The State Is Unworkable

While the Ninth Circuit's indemnification rationale alone warrants reversal, the opinion below is no more persuasive when it is read more generally as setting forth numerous criteria for determining whether an entity "is more like a county or city [which is not entitled to the immunity] than it is like an arm of the State." *Mt. Healthy*, 429 U.S. at 280-81. Like the Ninth Circuit, some courts have deemed the state treasury's liability for a money judgment to be an important factor in determining whether an entity is an arm of the state. *See, e.g.*, Pet. App. 7a ("State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state."); *see also* Alex E. Rogers, Note,

Clothing State Governmental Entities With Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum. L. Rev. 1243, 1291-96 (1992). But a state treasury's liability for a money judgment is too inherently unworkable a criterion to provide probative guidance, let alone be "the single most important factor in determining whether an entity is an arm of the state." Pet. App. 7a.

For instance, is it merely the possibility that a judgment will have to be paid out of state funds that renders an entity an arm of the state? Or must the entity show that in all cases its judgments are paid by the state treasury? Or is it enough that the judgment is satisfied primarily with state funds? *Cf. Brown v. Porcher*, 660 F.2d at 1006-07. Must the State's liability be set forth in the entity's enabling legislation? Or do past instances in which the State has paid judgments against the entity suffice? If so, what if the State has paid some judgments but not others? The disparate use of the state treasury factor by the various courts of appeals demonstrates how unworkable it is as a criterion for determining whether an entity is an arm of the State. *See* Note, 92 Colum. L. Rev. at 1291-96.

Moreover, as the States respond to the ever-changing social and economic problems of their citizens, reliance on whether the state treasury will pay the judgment in order to determine whether an entity is entitled to Eleventh Amendment immunity is both shortsighted and anachronistic. In recent years, the States have created a wide variety of entities to respond to the needs of their citizens, including community development, business development, housing finance and medical finance authorities. *See, e.g.*,

Durning, 950 F.2d at 1421; Note, 92 Colum. L. Rev. at 1250-51 & nn. 31-34. Most, if not all States, however, have longstanding constitutional limitations on the amount of their indebtedness. *See id.* at 1250. As a consequence, those important governmental programs which require major capital spending (such as universities, turnpike and housing authorities to name just a few) must be carried out by authorities and corporations which are nominally independent of the State executive department. Many of these entities do not, however, resemble in any sense local government entities which are not entitled to Eleventh Amendment immunity. To suggest that such entities are not entitled to Eleventh Amendment immunity simply because the State is technically not liable for any judgment is to ignore that they perform important programs on behalf of the State and that any federal court judgment will affect the entity in its performance of these functions. In the same way that a money judgment against the State would affect the State's ability to serve the citizenry, a money judgment against a technically off-budget state entity likewise affects its ability to serve.

The court of appeals' conclusion that state liability is the most important factor in determining whether an entity is an arm of the state has scant support in this Court's cases. *Lincoln County* contains no such assertion. *See* 133 U.S. at 530-33. Moreover, *Mt. Healthy* held that a school board "is more like a county or city than it is like an arm of the State" notwithstanding that it "receive[d] a significant amount of money from the State." 429 U.S. at 280. As *Mt. Healthy* demonstrates, whether a State is financially responsible for an entity frequently does

not answer the question of whether it is an arm of the state.[2]

While in this case it is clear the Ninth Circuit's decision relied solely on the indemnification agreement, the court applied its five-part test for determining whether an entity is an arm of the state. This test asks, in addition to whether the State would be liable for a money judgment, "'whether the entity performs central governmental functions,'" "'whether the entity may sue or be sued,'" "'whether the entity has power to take property in its own name or only the name of the state,'" and "'the corporate status of the entity.'" Pet. App. 6a-7a (quoting *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)).

This test is too indeterminate to provide guidance to state officials in structuring governmental operations. For example, are the factors other than whether the State would be liable (which the Ninth Circuit erroneously deems to be the "most important," Pet. App. 7a), equally weighted? If two factors support arm of the state status and two do not, is the entity an arm of the state or not?[3]

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[2] *Hess* is not to the contrary. That case involved a bi-state entity which by definition was answerable to more than one State and thus was presumptively not within the scope of the Eleventh Amendment. *See* 115 S.Ct. at 404; *see also id.* at 400 ("Bistate entities occupy a significantly different position in our federal system than do the States themselves.").

[3] Numerous lower federal courts continue to use similar multi-factor tests, which suffer from the same flaws of indeterminacy and reliance on criteria lacking in probative value. *See, e.g., PYCA Indus., Inc. v. Harrison County Waste Water Management Dist.*, 81 F.3d 1412, 1416-17 (5th Cir. 1996); *Treleven v. University of Minnesota*, 73 F.3d 816, 818 (8th Cir. 1996); *Iowa Comprehensive Petroleum Underground*

Of equal importance, these remaining factors are of little probative value in determining whether an entity is an arm of the state. Indeed, the Ninth Circuit's test is all the more remarkable for its failure to ask the most fundamental question—whether the entity is "politically accountable to the State, and by extension, to the electorate" at the level of statewide governance. *Hess*, 115 S.Ct. at 410-11 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia and Thomas, JJ.).

For example, the Ninth Circuit's second factor is "whether the entity performs central governmental functions." Pet. App. 6a. But other than resorting to tradition, which may well vary from State to State, there are no judicially manageable standards for making this determination. Moreover, even an analysis which looks to tradition to determine whether a function is one performed by central as opposed to local governments inherently conflicts with the notion of the States serving as the laboratories for social and economic experimentation which respond to changing conditions. *Cf. Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 545-47 (1985) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *see also id.* at 546 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) ("The science of government . . . is the science of experiment.")). As Justice Black observed, "The genius of our government provides that, within

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***Storage Tank Fund Bd. v. Amoco Oil Co.*, 883 F. Supp. 403, 413-22 (N.D. Iowa 1995); *New England Multi-Unit Housing Laundry Ass'n v. Rhode Island Housing & Mortgage Finance Corp.*, 893 F. Supp. 1180, 1188-90 (D.R.I. 1995) (applying "a seven-part test that is not exhaustive").**

the sphere of constitutional action, the people—acting not through the courts but through their elected representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring). The people, acting through their legislatures, surely have the attendant power to decide whether functions traditionally deemed to be local should be conducted at the state level.

Two of the remaining factors—whether the entity may sue or be sued and whether the entity holds property in its own name—are to a large degree simply surrogates for the fifth factor, whether the entity has corporate status. *See* Pet. App. 6a-7a. But these powers are also essential attributes of sovereignty. As the Court has long recognized, "[e]very sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal." *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). And as the Court has further acknowledged, "[a]lthough . . . a sovereign . . . may not be sued, . . . as a corporation or body politic [it] may bring suits to enforce [its] contracts and protect [its] property." *Id.*

That the State, in creating an entity, bestows upon that entity the power to sue, to hold property in its own name, or corporate status thus does not demonstrate that it is not an arm of the state. Without such powers, a state entity could not accomplish its purpose. Moreover, a State might very well enact legislation granting a state entity the power to sue or corporate status. *See, e.g., Florida Dept. of Health*, 450 U.S. at 149 (upholding Eleventh Amendment immunity notwithstanding that agency had "the

capacity to 'sue and be sued'" and was a "'body corporate'") (quoting Fla. Stat. § 402.34 (1979)). Such a grant of authority thus does not establish the entity's legal independence from the State. Indeed, the federal government has created numerous corporations to further important governmental objectives which are entitled to sovereign immunity absent congressional waiver. *See FDIC v. Meyer*, 114 S.Ct. 996 (1994); *see also Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961 (1995).

In *Meyer*, the FDIC's organic act granted the agency corporate status, with the attendant power "to sue and be sued." 114 S.Ct. at 1000 & n.3 (citations omitted). The Court nonetheless presumed that the FDIC was entitled to the United States' sovereign immunity and conducted a searching inquiry into the nature of the claim to determine whether it fell within the ambit of the Federal Tort Claims Act. *See id.* at 1000-1002. The *Meyer* Court ultimately concluded that "the United States simply has not rendered itself liable under" the FTCA for Meyer's claims, *id.* at 1001, but that the "sue and be sued" clause effected a broad waiver of the United States' sovereign immunity. *Id.* at 1002-4. It is noteworthy, however, that the Court did not deem the clause and the FDIC's corporate status as establishing that the entity was independent of the United States. Instead, the Court's analysis recognized that the FDIC was an instrumentality of the United States whose sovereign immunity was waived as a matter of legislative judgment. *See id.*; *cf. Lebron*, 115 S.Ct. at 974-75 ("[W]here . . . the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").[4]

To be sure, in *Lincoln County v. Luning* the Court relied on the corporate status of local government subdivisions to hold that they were not "a part of the state" for purposes of the Eleventh Amendment. 133 U.S. at 530-31. A local government entity, however, is generally subject to state control only in the most indirect sense. *See Hess*, 115 S.Ct. at 411 (O'Connor, J., dissenting). Rather, its officers are commonly elected by the voters within the entity's geographical boundaries, thus establishing that the entity is, as a matter of political organization, directly accountable at the local rather than state level. *Lincoln County* clearly did not hold that a government entity's corporate status removes it from the protection of the Eleventh Amendment even when it remains directly accountable to the State through the power to appoint its officials. *Cf. Lebron*, 115 S.Ct. at 973-74.

As the foregoing demonstrates, the various factors employed by the Ninth Circuit have no probative value in determining whether an entity is an arm of the state. Rather, the determination of whether a state entity "is more like a county or city than it is like an arm of the State," *Mt. Healthy*, 429 U.S. at 280-81, should be based on political control of the entity.

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[4] Moreover, that a State grants an entity the authority to sue without the approval of the State's attorney general is no more probative of whether an entity is independent of a State. Both the Federal Trade Commission and the Federal Election Commission are obviously arms of the Federal Government even though they possess substantial independent litigating authority. *See* 15 U.S.C. § 56(a) (FTC Act); *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S.Ct. 537, 541 (1994).

As Justice O'Connor has explained, "the proper question is whether the State possesses sufficient *control* over an entity performing governmental functions that the entity may properly be called an extension of the State itself." *Hess*, 115 S.Ct. at 410 (O'Connor, J., dissenting).

This test takes into account the treasury factor for "[i]t will be a rare case indeed where the state treasury foots the bill for an entity's wrongs but fails to exercise a healthy degree of oversight over that entity." *Id.* at 411. Moreover, it properly affords Eleventh Amendment immunity to the many entities which have independent budgets but which are fully subject to direct state control and thus cannot be fairly characterized as "more like a county or city than . . . an arm of the State." *Mt. Healthy*, 429 U.S. at 280-81. A test which focuses on political control of the entity is thus necessary to "assur[e] state governments the critical flexibility in internal governance that is essential to sovereign authority." *Hess*, 115 S.Ct. at 411 (O'Connor, J., dissenting).

The *Hess* majority's concern that determining whether a State controls an entity "can be a 'perilous inquiry,'" or "'an uncertain and unreliable exercise,'" 115 S.Ct. at 404 (quoting Note, 92 Colum. L. Rev. at 1284), is simply not implicated where, as here, an entity has only one rather than "multiple creator-controllers." *Id.* There is nothing "'uncertain and unreliable'" in such an approach, particularly if it is not extended beyond the simple and straightforward question of who appoints a majority of the entity's officials. Indeed, it is far less difficult

than many other inquiries routinely undertaken by the federal courts.[8]

When analyzed under the proper criterion, it is clear that the University of California is an arm of the State of California. Created by the California Constitution, the University is governed by a Board of Regents whose members comprise such senior state officials as the Governor, the Lieutenant Governor, the Speaker of the Assembly, and the Superintendent of Public Instruction. Cal. Const. Art. IX, § 9(a). In addition, the Board includes eighteen members "appointed by the Governor and approved by the Senate." *Id.* While the Board of Regents has substantial autonomy, "the State retains a measure of control" through the appointment power. *See Vaughn v. Regents*, 504 F. Supp. 1349, 1353 (E.D. Cal. 1981). Numerous decisions have thus long recognized that the University is "a constitutional department . . . of the state government." *Hamilton v. Regents*, 293 U.S. 245, 257 (1934) (citations omitted); *see also Thompson*, 885 F.2d at 1443; *BV Engineering*, 858 F.2d at 1395; *Vaughn*, 504 F. Supp. at 1353; *Ishimatsu v. Regents*, 72 Cal. Rptr. 756, 762-63 (Ct. App. 1968). And as the California Attorney General has explained, the University "is a constitutional corporation or department and constitutes a branch of the state government equal and coordinate with the legislature, the judiciary and the executive." 30 Ops. Cal. Atty. Gen. 162, 166 (1957). As such, the Uni-

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[8] Numerous federal entities commonly act with considerable autonomy from both congressional and executive oversight. *See, e.g., Lebron*, 115 S.Ct. at 972. But because their officials are appointed by the federal government, there is no dispute that these entities are arms of the federal government.

versity is an arm of the state and is therefore entitled to Eleventh Amendment immunity in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Respondents.

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AMICUS CURIAE BRIEF OF JAMES K. T. HUNTER IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Amicus is an attorney who is presently engaged in litigation on behalf of one of his clients, Keeley Tatsuyo Hunter, against Petitioner The Regents of the University of California ("Regents") in the United States District Court for the Central District of California. Regents has asserted Eleventh Amendment immunity from suit in federal court in defense of certain claims in this litigation, with amicus arguing that Regents is not entitled to such immunity. One of the key propositions which amicus contends negates Eleventh Amendment immunity

for Regents is the state treasury's lack of legal liability for *any* judgment against Regents.

In reviewing the Court of Appeals' decision, amicus noted that both the majority and dissent assume, implicitly and explicitly, respectively, that in the absence of any claim for reimbursement or indemnity from the federal government or other third party, the state treasury is legally liable for a judgment against Regents. This assumption, which is demonstrably erroneous, constitutes important, if not crucial, support for the further erroneous assumption in Petitioners' "QUESTION PRESENTED" that Regents "otherwise would be considered part of the State or an 'arm of the State' and thereby immune from suit in federal court under the Eleventh Amendment." Accordingly, because of the importance to amicus' client of ensuring that this Court does not in whole or in part premise its determination as to Regents' Eleventh Amendment immunity on the preceding, and interrelated, erroneous assumptions, this brief is submitted to assist the Court in its resolution of this case.[1]

SUMMARY OF ARGUMENT

The two principal concerns which govern whether the Eleventh Amendment shields an entity from suit in federal court are (a) liability of the state treasury for a judgment against the entity and (b) the level of control which the State exercises over such entity. While the Court of Appeals' decision focused on the economic impact of a judgment rather than on the legal liability of the State, the propriety of that focus is irrelevant to the decision's

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

correctness since, in any event, the state treasury is not legally liable for a judgment against Regents. With regard to control, the lines of oversight of the elected state government are not only indirect and insubstantial, but any political accountability to the State is constitutionally prohibited.

Thus, the assumption in Petitioners' "QUESTION PRESENTED" that Regents "otherwise would be considered part of the State or an 'arm of the State' and thereby immune from suit in federal court under the Eleventh Amendment" is erroneous. Regents is not an "arm of the State" entitled to Eleventh Amendment immunity from suit in federal court without regard to any claim it has for reimbursement or indemnity from the federal government or other third party.

ARGUMENT

REGENTS IS NOT AN ARM OF THE STATE WITHOUT REGARD TO ANY CLAIM IT HAS FOR REIMBURSEMENT OR INDEMNITY FROM THE FEDERAL GOVERNMENT OR OTHER THIRD PARTY

As the Fourth Circuit noted in *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995), this Court's decision in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1994), although specifically addressing the Eleventh Amendment's application to the multistate entities created under the Compact Clause, wrought more than "inconsequential" changes to that Circuit's (and also the Ninth Circuit's) Eleventh Amendment analysis as they bear on single state issues. In

particular, *Hess* clearly places primary (and arguably determinative) emphasis on the vulnerability of the State's purse (*see id.* at 115 S.Ct. at 404 [acknowledging that "vulnerability of the State's purse" is generally considered the "most salient" factor] and at 115 S.Ct. at 410 [O'Connor, J. dissenting, characterized majority as holding that "vulnerability of the state treasury is determinative"]), with secondary emphasis being accorded by the majority (and primary emphasis by the dissent) to control.

The Court of Appeals' decision does not cite *Hess*, nor does it indicate any consideration of the impact of that decision on either (1) the viability and proper application of the five-factor analysis applied below or (2) the continued force of prior decisions which had accorded Eleventh Amendment immunity to Regents. In addition, both the majority and dissent assume, implicitly and explicitly, respectively, that the state treasury is legally liable for a judgment against Regents. *Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 775, 777 (9th Cir. 1995) [majority: "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation"; dissent: "No one has disputed that a judgment against the University of California is a legal obligation of the State of California"].

As explained below, the combined effect of the above-mentioned aspects of the Court of Appeals' decision is that it reaches the right result for the wrong reasons. More particularly, Regents is not entitled to Eleventh Amendment immunity from suit in federal court without regard to any claim it has for reimbursement or indemnity because (1) the state treasury is never legally liable for any judgment against Regents and (2)

the lines of oversight of the elected state government are not only indirect and insubstantial, but any political accountability to the State is constitutionally prohibited.

A. The State Treasury Is Not Legally Liable For A Judgment Against Regents Under Any Circumstances

In their "SUMMARY OF ARGUMENT," Petitioners state as if it were uncontrovertible fact that "[a] judgment against the University would be a legal obligation of the State of California." (Brief for Petitioners, p. 10.) In the "ARGUMENT," however, Petitioners' support for that assertion turns out to consist solely of (1) various conclusory assertions by Judge Canby in dissent based on the fact that "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California" (*Doe*, 65 F.3d at 777) and (2) the failure of the Court of Appeals to "take issue with Judge Canby's conclusion that the State will be legally liable for any judgment rendered against it." (Brief for Petitioners, p. 21.)

In fact, as Regents' counsel unquestionably well knows, California law provides that, *uniquely among all state public entities*, a judgment against Regents is *not* a legal obligation of the State of California. California Government Code §§ 905.6, 943 and 965.9.[2] *See*

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[2] These sections provide in full as follows:

Section 905.6

"This part [California Government Code §§900, *et seq.*, dealing with claims against public entities] does not apply to claims against [Regents]."

(continued)

generally, 35 Cal.Jur.3d (Rev.), Part 2, Government Tort Liability §130, at p. 241 ["The provisions governing the payment of claims and judgments against the state, however, do not apply to claims, settlements, and judgments against [Regents]." (Footnotes omitted.)]. Thus, this "most salient" of the *Hess* factors strongly supports, if not itself compels, the conclusion that Regents is not entitled to Eleventh Amendment immunity from suit in federal court.[3]

(fn. continued)

Section 943

> "This part [California Government Code §940, *et seq.*, dealing with actions against public entities and public employees] does not apply to claims or actions against [Regents] nor to claims or actions against an employer or former employer of [Regents] arising out of such employment."

Section 965.9

> "This chapter [California Government Code §§965, *et seq.*, dealing with payment of claims and judgments against the State of California] does not apply to claims, settlements, and judgments against [Regents]."

[3] At one point in *Hess*, the Court describes the state treasury liability concern as whether the State is obligated to bear and pay the indebtedness resulting from an excess of expenditures over receipts "both legally and practically." *Hess*, 115 S.Ct. at 406. Yet the Court offers no guidance as to how a "practical" obligation is to be distinguished from a "legal" obligation. Amicus would respectfully suggest that there is and can be no uniform answer as to the State's "practical obligation" to pay all or any portion of such an indebtedness, and that whether the State in fact did so would depend on numerous factors and circumstances, including, but by no means limited to, the size of the indebtedness, the health of the state

(continued)

B. The Lines Of Oversight Of The Elected State Government Over Regents Are Not Only Indirect And Insubstantial, But Any Political Accountability To The State Is Constitutionally Prohibited

As Justice Brennan observed in his concurring opinion in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314, 110 S.Ct. 1868, 1877 (1990):

> "The rule to be derived from our cases is that the Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts, for instance a state agency. In contrast, when a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its 'arms.' This is so even though these political subdivisions exist solely at the whim and behest of their State."

(fn. continued)
treasury, the mood of the public, the explanation for Regents having incurred the indebtedness and the attitude of the legislature and governor toward Regents, raising taxes and/or cutting government spending.

More recently, in *Hess*, Justice O'Connor, in dissent, commented on the control test as follows:

> "An arm of the State, to my mind, is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the electorate. The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial — for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings — then the entity should be deemed an arm of the State for Eleventh Amendment purposes." 115 S.Ct. at 411 (1994) (O'Connor, J., dissenting).

Applying the foregoing control tests to Regents, and in particular contrasting the results of those tests with those which obtained in *Hess*, the conclusion is inescapable that Regents does not qualify for Eleventh Amendment immunity thereunder, even as such tests were applied by the dissenting Justices in *Hess*. In *Regents of the University of California v. Superior Court of Alameda County (Regan)*, 17 Cal.3d 533, 537 (1976), the California Supreme Court cited article IX, section 9, of the California Constitution for the proposition that "the University is intended to operate as independently of the state as possible." *Id.* Indeed, although the California Constitution provides that eighteen of the twenty-five members of the Regents' board are to be

appointed by the Governor, with the approval of a majority of the Senate,[4] it further provides that "*[t]he university shall be entirely independent of all political* or sectarian *influence and kept free therefrom in the appointment of its regents and in the administration of its affairs*. . . ." California Constitution, art. IX, §9(f). Further, there is no express right of removal (contrary to what appears to have been the case in *Hess*, 115 S.Ct. at 411), and no veto power by the elected state government over Regents' actions.

In sum, not only is Regents imbued with, at the least, "a significant measure of autonomy," but the "elected state government" exercises only indirect and insubstantial oversight over Regents — and even that oversight is constitutionally required to be entirely free of all "political" influence. Thus, with respect to Regents, both the state treasury liability and control tests point in the same direction, and against any Eleventh Amendment immunity being accorded Regents from suit in federal court.

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[4] The remaining seven *ex officio* members are the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and vice president of the alumni association of the university and the acting president of the university. California Constitution, article IX, §9(a).

CONCLUSION

In essence, the Court of Appeals' decision constitutes an extended analysis of the implications of a key erroneous assumption — namely: that the state treasury is legally liable for a judgment against Regents. Because of this erroneous assumption, neither the majority's nor the dissent's opinions (nor the Brief of Petitioners) analyzes whether Regents qualifies for Eleventh Amendment immunity under the actual state of the law (i.e., where the state treasury is *not* legally liable for a judgment against Regents). As a result, this Court would certainly be justified either (1) in remanding this case to the Court of Appeals for reconsideration in light of the State purse's nonvulnerability to a judgment against Regents or (2) finding that certiorari was improvidently granted. Amicus submits, however, that Regents' failure to satisfy the criteria for Eleventh Amendment immunity is clear, and that this Court, albeit for different reasons than were stated by the Court of Appeals, should affirm its decision.

DATED: September 26, 1996.

Respectfully submitted,

JAMES K. T. HUNTER

Amicus Curiae